

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL.,

APPELLANTS

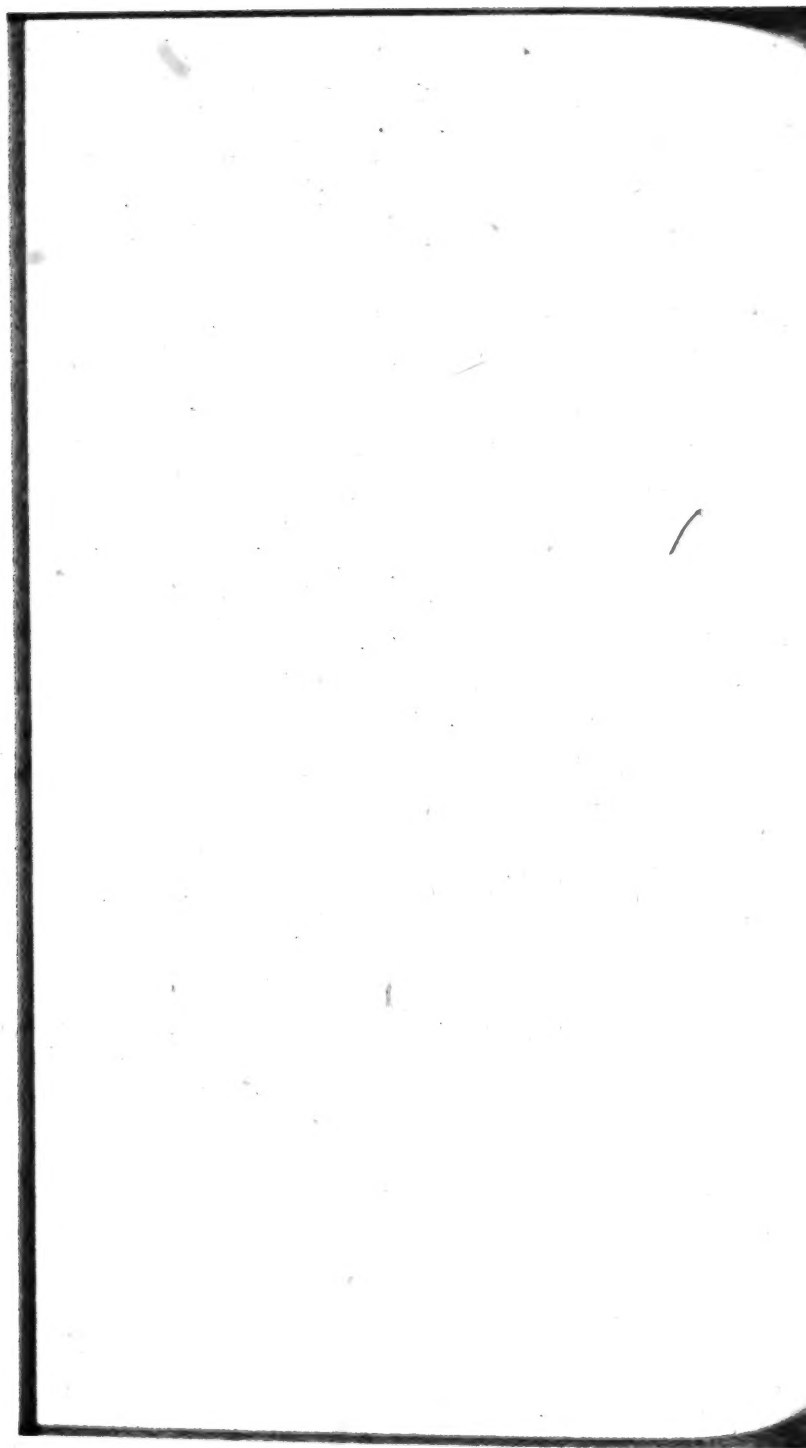
v.

HOWARD B. LEVY

***ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT***

INDEX

	Page
Relevant docket entries	3
The charges and specifications against appellee	7
The petition for habeas corpus	12
Appellee's motion for production of documents	39
Appellee's motion for disclosure of information obtained by eavesdropping	47
Order on jurisdiction	51



RELEVANT DOCKET ENTRIES

Date	Proceedings
	United States District Court
April 19, 1969	Petition for writ of Habeas Corpus, with Exhibits A. and B.
April 19, 1969	Exhibit C. (Affidavits)
April 19, 1969	Application for Bail, Memorandum and Certificate of Service.
April 19, 1969	Motion for Production of Documents, Brief and Certificate of Service.
May 6, 1969	Order of Court, granting rule upon respondent, J. J. Parker, Warden, to show cause why a writ of habeas corpus should not be granted. Rule returnable May 16, 1969.
May 7, 1969	Order of Court denying petitioner's application for bail. (S)
May 8, 1969	Notice of appeal filed by petitioner from the order denying bail entered in this action on 5-7-69.
May 8, 1969	Motion of petitioner to have privileged communications with counsel.
May 8, 1969	Memorandum in support of motion to have privileged communications with counsel.
May 8, 1969	Motion and Memorandum filed with court on 5/8/69 received in Clerk's office 5/12/69.
May 13, 1969	Order of Court, fixing time for argument on petitioner's motion to have privileged communications with counsel for Friday, May 23, 1969 at 11:00 a.m. in Court Room No. 1, United States Court House, Harrisburg, Pa. (S)

Date	Proceedings
June 3, 1969	Order (certified copy) of Court of Appeals, denying appellant's application for bail.
June 16, 1969	Order of Court, fixing time for filing traverse to "Respondent's Return to Rule to Show Cause and Answer to Petition for Writ of Habeas Corpus" on or before Thursday, July 3, 1969.
June 30, 1969	Memorandum and order that the motion of Howard B. Levy, petitioner, to have privileged communications with counsel is denied in all respects. (S)
July 3, 1969	Motion of Levy for disclosure of information obtained by eavesdropping, and certificate of service thereof.
July 24, 1969	Notice of Appeal from order of June 30, 1969, and notice of mailing thereof to counsel of record.
August 5, 1969	Order of Court, requiring admission to bail—ordered that petitioner be released in the custody of his counsel, Charles Morgan, Jr., provided that he execute a bond in the amount of \$1,000.00 either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof. The conditions of said release and bond shall be limited to the following: (a) Petitioner shall appear in the U.S. District Court for the Middle District of Penna. and at such other places as petitioner may be required to appear in accordance with any and all orders or directions relating to petitioner's appearance as may be given or issued by the U.S. District Court or any other U.S. District Court to which the cause may be transferred, or any appellate court in which proceedings in this

Date

Proceedings

cause are had. (b) Petitioner shall abide by any modification or reversal by the Supreme Court of the United States of the order of Mr. Justice Douglas dated August 2, 1969, and in this event, surrender himself forthwith or otherwise act in accordance therewith. (c) Petitioner shall not leave the continental limits of the United States. (d) Petitioner shall make certain that at all times his counsel, Charles Morgan, Jr., is apprised of his whereabouts. (e) If petitioner violates any of the conditions of this order, a warrant for his arrest will issue immediately. It is ordered that petitioner's release is further conditioned on his acceptance in writing of the above conditions

August 7, 1969

Order (certified copy) issued by Mr. Justice Douglas on August 2, 1969 admitting Mr. Levy to bail in the amount of \$1,000.00 pending final determination of his application for a full court in October.

August 21, 1969

Memorandum opinion (corrected copy) of Mr. Justice Douglas issued August 2, 1969, in connection with application for bail.

October 15, 1969

Letter from Clerk of the Supreme Court of the United States. On October 13, 1969 the Supreme Court handed down the following order:

"The application for bail granted by Mr. Justice Douglas pending action by this Court is continued pending disposition of the case by the United States District Court for the Middle District of Pennsylvania. Mr. Justice Marshall took no part in the consideration or de-

Date

Proceedings

- cision of this application." (Dated 10-13-69)
- Mar. 3, 1970 Order that the argument on petitioner's motions for production of documents and disclosure of information obtained by eavesdropping is fixed for Monday, March 16, 1970, at 2:00 p.m., at the United States Courthouse, Scranton Pa. (S)
- Aug. 21, 1970 Opinion and order denying petitioner's motions for production of documents and for disclosure of information obtained by eavesdropping. (S) (See Doc. 69)
- October 21, 1970 Order amending opinion filed Aug. 21, 1970. (S)
- Feb. 17, 1971 Order that Tuesday, March 16, 1971, at 11:00 a.m., Wilkes-Barre, Pa., is fixed as the time and place for hearing on the petition for writ of habeas corpus. (S)
- Mar. 15, 1971 Application of Howard B. Levy for reconsideration of the denial of a Motion for Production of documents.
- June 30, 1971 Memorandum and order-in accordance with memorandum this day filed, it is ordered that the petition for a writ of habeas corpus be and the same is hereby denied. (S)
- June 30, 1971 Order of Court; it is ordered that petitioner's motion, filed March 15, 1971, for reconsideration of the denial of petitioner's motion for production of documents is hereby denied. (S)
- Aug. 25, 1971 Notice of appeal filed by Howard B. Levy, and Certificate of service thereof. Copy of Notice of appeal mailed to the U.S. Court of Appeals.

Date

Proceedings

United States Court of Appeals

Oct. 4, 1971	Copy of Notice of Appeal received. August 27, 1971, filed.
Apr. 18, 1973	Opinion of the Court (Seitz, Chief Judge & Aldisert & Rosenn, Circuit Judges) with separate opinion by Seitz concurring in part and dissenting in part, filed.
Apr. 18, 1973	Judgment reversing the judgment of the D. C. filed June 30, 1971 and remanding the cause for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court with costs taxed against appellees, filed.
May 10, 1973	Certified judgment in lieu of formal mandate issued, filed.
May 16, 1973	Notice of appeal by appellees to the Supreme Court of the United States pursuant to Title 28, U.S. Code Section 1252, filed.
July 13, 1973	Motion by appellees to stay that portion of this Court's order and Mandate of of 4/18/73 etc., filed. (4cc) service attached.
July 17, 1973	Appellant's opposition to appellee's motion to stay portion of this Court's order and mandate, etc., filed. (4cc) service attached.
July 19, 1973	Copy of letter dated July 17, 1973 which advises counsel that extension of time to docket appeal in S.C. granted to July 30, 1973, received from Clerk of Supreme Court.

Date

Proceedings

July 26, 1973

Order (Seitz, Chief Judge and Aldisert and Rosenn, Circuit Judges) recalling the mandate issued on May 10, 1973; staying the issuance of the mandate on the condition that an appeal be docketed on or before July 30, 1973; no further extensions will be granted, See Rule 18(1) of the Rules of the Supreme Court of the United States, filed.

July 26, 1973

Certified copy of above order to Clerk of Supreme Court.

Aug. 3, 1973

Notice of filing (on July 30, 1973) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 73-206)

Oct. 29, 1973

Certified copy of Supreme Court order dated October 23, 1973 postponing the consideration of the question of jurisdiction to the hearing of the case on the merits, directing the case be set for oral argument in tandem with No. 72-1713, received from Clerk of Supreme Court, filed. (S.C. No. 73-206)

THE CHARGES AND SPECIFICATIONS AGAINST APPELLEE

CHARGE I: Violation of the Uniform Code of Military Justice, Article 90.

Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with Special Forces *AidMen (Airborne)*, *S-R-F16, Dermatology Training*, did, at the United States Army Hospital, Fort Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, wilfully disobey the same.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

ADDITIONAL CHARGE I: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,'" or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight", or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his im-

mediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army.

ADDITIONAL CHARGE II: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBienPhu'. I am, however, 'deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there & would refuse to serve there if I were so assigned. . . ."

"The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. . . ."

"Is Communism worse than a U.S. oriented Government? . . . Are the North VietNameese worse off than the South VietNameese? I doubt it . . ."

"Geoffrey who are we fighting for? Do you know? Have you thought about it? You're real battle is back

here in the U.S. but why must I fight it for you. The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your helping them. Why? You, no doubt, know about the error the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the VietNameese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe . . . Bull Shit! . . ."

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a VietNameese. At least the Viet Cong have that on their side . . . Geoffrey these people may not be sophisticated (American Style) but their grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. . . .",

or words to that effect.

ADDITIONAL CHARGE III: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing United States foreign policy as a "diabolical evil" designed more to protect

selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and the United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor whites; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr., for fighting with the United States Army in Viet Nam; (8) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the VietNameese people at heart, in violating of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,

PETITIONER

v.

JACOB J. PARKER, as Warden of
the United States Penitentiary,
Lewisburg, Pennsylvania, and
STANLEY R. RESOR, as Secretary
of the Army,

RESPONDENTS.

No. 1057 H.C.

[Filed Apr. 19, 1969]
T. H. Campton, Clerk
Per.
Deputy Clerk

PETITION FOR WRIT OF HABEAS CORPUS

The petition of HOWARD B. LEVY respectfully shows:

1.

Petitioner applies for a Writ of Habeas Corpus because he is imprisoned at the Lewisburg Prison Farm in the custody of the respondent Jacob J. Parker, Warden of the United States Penitentiary, Lewisburg, Pennsylvania. Certain documents relative to petitioner's cause are in the possession of or are subject to the control of the respondent, Stanley R. Resor, as Secretary of the Army.

2.

The cause of petitioner's imprisonment is a judgment of conviction rendered by general court-martial at Fort Jackson, South Carolina June 2, 1967. On June 3, 1967, this conviction resulted in a sentence of three years confinement at hard labor, dismissal from the service, and forfeiture of all pay and allowances.

3.

Petitioner is in custody under or by color of the authority of the United States, in violation of the Constitution, laws or treaties of the United States. Jurisdiction is conferred

on this court by 28 U.S.C. § 2241. Ancillary jurisdiction is conferred on this court by the Voting Rights Act of 1957, especially 42 U.S.C. § 1971(b) and (d), and the Voting Rights Act of 1965, especially U.S.C. § 1973i and 1973j.

4.

Intra-military remedies have been exhausted.

5.

No prior application challenging post-conviction detention on the within grounds has been made to any court.

6.

Petitioner was convicted of violating Articles 90, 133 and 134 of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 890, 933 and 934, respectively).

a. Under Article 90 UCMJ (which provides in pertinent part "Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer; shall be punished . . . by such punishment other than death as a court-martial may direct") petitioner was charged with the following:

"Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces Aidmen in dermatology in accordance with *Special Forces Aidmen (Airborne)*, 8-12-F16, *Dermatology Training*, did, at the United States Army Hospital, Fort Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, willfully disobey the same."

b. Under Article 133 UCMJ (which provides in pertinent part "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct") petitioner was charged with the following:

"Specification: In that Captain Howard B. Levy,

United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients, as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,' " or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing

of enlisted personnel performing duty under his immediate supervision and control that "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army."

c. Under Article 134 UCMJ (which is entitled "General Article" and provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.")

petitioner was charged with the following:

"Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and chil-

dren", or words to that effect, which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

7.

Additionally petitioner was charged with violating Articles 133 and 134 UCMJ due to a single letter which he wrote on September 10, 1965 to a serviceman in Vietnam. The court-martial heard the evidence introduced under these charges, heard argument based thereon prior to its verdict, and convicted on a lesser included offense. After return of the verdict but prior to sentencing these charges were dismissed upon motion of the prosecution. These charges and their specifications are set forth in Exhibits A 1 and A 2. A copy of the letter upon which they were based is attached as Exhibit A 3.

8.

Petitioner's trial resulted in a conviction in violation of the first, fourth, fifth, sixth, and ninth amendments of the Constitution of the United States and Article III, Section 2, Paragraph 3 of said Constitution as hereinafter more fully set forth, said violations being of such magnitude and importance as to taint the entire proceeding and result in the loss of jurisdiction by the court-martial.

9.

Petitioner's attempts to raise the federal constitutional questions herein set forth were frustrated or, if ruled upon, were ruled upon in violation of and contrary to the applicable provisions of the Constitution and laws of the United States. The errors assigned in the intra-military appeals process are set forth as Exhibit B, hereto.

10.

Articles 90, 133 and 134 UCMJ were unconstitutionally applied to petitioner in that:

- a. They would not have been applied but for petitioner's political and racial beliefs and expressions;
- b. Their application having been undertaken, the charges were elevated from non-judicial punishment to general

court-martial status due to matter contained in a G-2 Dossier only 80 of the 180 pages of which were provided petitioner's civilian counsel (who was retained as his Chief Defense Counsel and was a member of the bars of state and federal courts, and the Supreme Court of the United States), the remaining 100 pages being suppressed and denied to petitioner and such counsel;

c. The charges were based upon petitioner's pre-service political activities and expressions;

d. The court-martial was activated because of petitioner's out-of-uniform efforts to register Negro citizens to vote in the State of South Carolina (see, *e.g.*, affidavits filed simultaneously herewith in a separately bound volume labeled Exhibit C, Affidavits" and by reference made a part hereof);

e. Petitioner having moved for a severance of trial on the charge under Article 90 UCMJ, he was unconstitutionally denied the right to have that charge considered apart from the other four charges—the pure speech charges—which brought before the court-martial material prejudicial to defendant and irrelevant to that charge; and curtailed or denied petitioner's right to choose whether to remain silent or testify on his own behalf.

11.

Additionally, Article 90 UCMJ was unconstitutionally applied to petitioner in that:

a. The order required petitioner, a physician, to train in medicine non-medical personnel (combat troops) in violation of accepted standards of medical ethics;

b. The order required petitioner to reveal the medical secrets of his patients to non-medical personnel (combat troops) in violation of accepted standards of medical ethics;

c. The Law Officer having ruled that petitioner was entitled to defend against this charge on the ground the order was not "lawful" in that its execution would involve him and the trainees in the commission of war crimes, then refused to allow the presentation of proof thereof to the court-martial;

d. The order was issued in order to punish petitioner for unorthodox but constitutionally protected thought and speech;

e. The order was issued as a result of petitioner's off-base out-of-uniform participation in Negro voter registration activities.

12.

Articles 133 and 134 UCMJ are unconstitutional on their face in that they are overbroad and vague and as a result thereof violate the first and sixth amendments and the due process clause of the fifth amendment of the Constitution of the United States.

13.

Articles 133 and 134 were unconstitutionally applied to petitioner in this case in that :

a. They were selectively applied in order to silence dissent;

b. They were applied solely to punish unorthodox thought and speakers;

c. Their application was based upon petitioner's political and racial beliefs and expressions;

d. Their application having been undertaken, the charges was elevated to general court-martial status due to matter contained in a G-2 Dossier only 80 of the 180 pages of which were provided petitioner's civilian counsel, the remaining 100 pages being refused petitioner and such counsel;

e. The charges were based upon petitioner's pre-service political activities and expressions;

f. The court-martial was activated because of petitioner's out-of-uniform efforts to register Negro citizens to vote in the State of South Carolina (see, *e.g.*, Exhibit C, Affidavits, *supra*);

g. Petitioner having moved for a severance of trial on the charges, he was unconstitutionally denied the right to have the speech charges considered apart from the order charge, and the right to have the charges purportedly based upon oral statements at Fort Jackson (paragraphs 6b and 6c, *supra*) and the charges purportedly based on a letter to a soldier in Vietnam (paragraph 7, *supra*), considered apart from the order charge (paragraph 6a, *supra*), all of which brought before the court-martial material prejudicial to defendant and irrelevant to other charges, and curtailed or denied petitioner's right to choose whether to remain silent or testify on his own behalf.

14.

Articles 133 and 134 UCMJ were unconstitutionally applied in that specifications drawn thereunder were overbroad and vague and as a result thereof violated the first amendment, the due process clause of the fifth amendment and the notice provision of the sixth amendment of the Constitution of the United States; additionally, such specifications were violative of the Constitution on the grounds set forth in Paragraph 10 hereof.

15.

Further, petitioner was unconstitutionally tried in that:

- a. he was denied the right to trial by jury;
- b. he was denied the right to compulsory process;
- c. he was denied the right to confrontation of his accusers;
- d. he was denied the right to effective civilian counsel;
- e. he was subjected to trial by *ex post facto* law and subjected to a bill of attainder or pains and penalties;
- f. he was tried by a court-martial from which medical personnel, women, and persons of rank the same as or below him were excluded by regulation and practice;
- g. he was tried in a system of justice controlled by a commanding general in that military personnel—the investigating officer, the staff judge advocate, defense and prosecution attorneys, the members of the court-martial, and most of the witnesses—were subject to his discretionary appointment, control and promotion and said commanding general ordered the court-martial to convene;
- h. he was judged by the law of war, no war having been declared and the oath administered to court members thereunder being undecipherable;
- i. he was tried under the UCMJ by military authorities, the system of justice provided thereby being in violation of the Bill of Rights of the Constitution of the United States, the sole exception being the grand jury clause of the fifth amendment.

16.

Petitioner was unconstitutionally convicted under Articles 133 and 134 UCMJ in that:

- a. The clear and present danger test was not, in fact,

applied to the speech charges, a "reasonable and natural tendency of the words" standard adopted from a manslaughter charge being used instead;

b. There was no evidence of a clear and present danger;

c. There was no evidence that petitioner's statements were made in a manner other than privately or informally, opinions so expressed being protected by Army Regulation 600-20, Paragraph 42.

d. There was no evidence upon which a conviction could be based.

17.

Petitioner's sentence with allowance for good time served will expire in August, 1969.

18.

Simultaneously herewith the following are being filed:

a. An application for bail pending hearing on this petition for Writ of Habeas Corpus and a Memorandum of Authorities thereon;

b. A motion directed to respondent Resor to produce the entire G-2 Dossier compiled on petitioner and other documents which are in respondent Resor's possession or subject to his control;

c. The entire 19 Volume Record of the trial of petitioner and the post-trial review by the staff judge advocate;

d. A three-volume Appendix of Extracts from the Record;

e. Exhibit C, Affidavits, referable hereto;

f. A Compendium of reported and unreported decisions, opinions and orders relating hereto;

g. A Brief on the Merits.

WHEREFORE, petitioner prays for the following relief:

(i) that a Writ of Habeas Corpus issue herein directed to the respondent Parker, commanding him to produce the body of the petitioner, **HOWARD B. LEVY**, before this court at a time and place to be specified in such writ, so that this Court may inquire into the cause of petitioner's detention, and commanding respondent not to allow the transfer of petitioner to any other place (except the United States Prison Farm at Allenwood, Pennsylvania, which is within the jurisdiction of this Court and the inmates of which are

subject to the custody of respondent Parker) or more restrictive condition of confinement, pending final hearing and determination of this application and any appeals therefrom;

(ii) that petitioner be admitted to bail pending a hearing and determination of this cause;

(iii) that this Court, after a full and complete hearing, order petitioner discharged from custody;

(iv) for such other and further relief as may be just and proper.

HOWARD B. LEVY, Petitioner

By s/ Charles Morgan, Jr.

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EXHIBIT A

1. ADDITIONAL CHARGE II: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBien-Phu'. I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there and would refuse to serve there if I were so assigned. . . .

"The only question that remains, is essentially 1) are we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I am for the second proposition. . . ."

"Is Communism worse than a U.S. oriented Government? . . . Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it. . . ."

"Geoffrey who are you fighting for? Do you know? Have you thought about it? You're real battle is back here in the U.S. but why must I fight it for you? The

same people who suppress Negroes and poor whites here are doing it all over again all over the world and your helping them. Why? You no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the Viet Nameese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem? Trujillo, Batista, Chang Kai Shek, Franco, Tshombe—BullShit! . . .”

“I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a Viet Nameese. At least the Viet Cong have that on their side. . . . Geoffrey these people may not be sophisticated (American Style) but they're grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. . . .”,

or words to that effect.

2. ADDITIONAL CHARGE III: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing the Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing

United States foreign policy as a "diabolical evil" designed more to protect selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and the United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor whites; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr., for fighting with the United States Army in Viet Nam; (8) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the Viet Nameese people at heart in violation of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

3. THE LETTER

1041 Morrison St.
Columbia, South Carolina
9-10-65

Dear Geoffrey

Let me begin by introducing myself. My name is Howard Levy. I'm an Army Dermatologist at Fort Jackson, S.C. I'm a friend of Bill Treanor with whom I've worked during this summer on the SCLC civil rights drive in my spare time.

I've read your letters to Bill & have been especially interested in your views on Viet Nam since I too have had a deep seated interest in the situation there. I would not attempt to contest your views on the military situation

there although I would suggest that you read (if you have not already done so) Jules Roy's book, "The Battle of DienBienPhu." I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those people back in the States who actually opposes our effort there & would refuse to serve there if I were so assigned. I would like to outline some of the reasons for my stance.

Bill has informed me that you are well acquainted with the history of Viet Nam so that I will not cover old ground. I think you would agree that from the time we backed Diem that we have politically not been very astute. The only question that remains, is essentially, 1) were we merely naive & therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition.

I do not believe that you can realistically judge the Viet Nam war as an isolated incident. It must be viewed in the context of the recent history of our foreign policy—at least from the start of the cold war.

Basically there are two arms to our foreign policy—one stated by our State Department & the other unstated 1) The stated part—to contain "Communism" & 2) the unstated part—to support "stable" governments so that our foreign investors may profit. It should be noted that our definition of "Communism" is very, very broad. So broad in fact as to become practically worthless. The record is clear—the U.S. has helped suppress every left liberal revolt that you could name if there was available in the country a "more acceptable" right wing figure who could be more easily manipulated. You see, unfortunately for our government, left liberal governments often have the interests of their countrymen at heart & this runs counter to our interests. For example the Alliance for Progress has been almost a total failure—largely because every time a Latin American government tried to implement a true land reform program (part of the Alliance for Progress program) we have found some reason to balk & not approve the project. This isn't surprising since either U.S. companies own or control much of the land in these countries. Yet without land reform nothing will work in Latin America.

Of course our propaganda mills, the newspapers & the mass media, cover up our sins. Invariably communists are

found to take the blame. Do you really believe that the Dominican Republic was in danger of a Communist overthrow. Responsible non-communist critics in Latin America don't. Juan Bosch said, "these 56 Communists couldn't run a first class hotel let alone a country." He was being generous to the U.S. because later events prove that there weren't even 56 Communists in the country at the time. The same is true in the Congo. Is Tshombe a great patriot? Few in the Congo think so. Yet we support him. Could it be because he can be "counted on"? I think so.

Let's attack it from another, more radical, approach. What if the majority of a people decide that Communism is good for them. Do we, does anybody have a right to deny them this choice. We might disagree emotionally & might try to prove that our way is better but by any stretch of any moral principle can we deny them the choice. Is Communism worse than a U.S. oriented government? The fastest growing economy in Latin America is Cuba. Everybody reads & writes in Cuba. Everybody has medical care. Was this true with the previously American backed government? Not on your life. Is it true in other American backed governments in Latin America? Far East? Near East? Where? The only true examples are Europe & Japan & here only because it served as a bulwark against the Communists. To get closer to home (your home & I hope its temporary) are the North Vietnamese worse off than the South Vietnamese? I doubt it. If they are why do so many back the Viet Cong. Guerrilla terrorism? Unlikely. The truth is that the North has instituted land reform, schools & medical facilities (as best as they could in a still very poor country). Why hasn't it happened in the South & why do you insist that it will happen. It hasn't in any of our other colonies. It didn't even happen in the U.S. until the Negro got off his ass & has made it happen. Do you really think that the big business-military complex in the U.S. are big hearted. They never have been. In the early 1900's labor men & women fought & died for what they obviously deserved—enough food to live. And its still happening. Ask Bill about unions & labor conditions in the South. Well these same companies have vastly more influence on our foreign policy & they're effective.

Geoffrey, who are you fighting for? Do you know? Have you thought about it? You're real battle is back here

in the U.S. but why must I fight it for you? The same people who suppress Negroes & poor whites here are doing it all over again all over the world & you're helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the Vietnamese? A dead woman is a dead woman in Alabama & in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem, Trujillo. Batista, Chiang Kai-Shek, Franco, Tshombe Bullshit?

As I mentioned earlier I don't contest your position that we can win. The question, is win what. If we must destroy a whole people to win then I don't understand the true context of the word. Who are we winning for? The government in Saigon? Which one? It may change before you receive this letter. I would hasten to remind you that despite your obvious courage & enthusiasm, Viet Nam is not our country & you are not a Vietnamese, At least the Viet Cong have that on their side. Or do you take the position that you are the noble white father helping these poor ignorant people? How uplifting it must seem to you. Unhappily its an illusion. These people know more about America & her generosity than you or I—thanks to the American puppets in Saigon. You're no different than the Governor of Alabama telling the Negroes that he has their best interests at heart. Even if it were true, & it is not, it would be a contemptible argument because it's so damn condescending. Geoffrey, these people may not be sophisticated (American style) but they're grown men & women who have a right to live & choose their own government. You know—they're even allowed to make a mistake—at least let them make it—don't make it for them.

I've enclosed an article you might find interesting—maybe it will help explain some of the "morale back home."

I would appreciate your views on some of the points I have raised. In any event let me wish you good luck & safe conduct in your present situation.

Yours truly

Howard Levy

EXHIBIT B

Assignment of Error No. 1

The Board of Review erred in upholding the law officer's failure to cause the dismissal of Charge II and additional Charges I, II and III. It also erred in upholding the Court's failure to acquit on Charge II and additional Charges I and II.

1. On Charge II, there was no evidence that the statements of the appellant were made publicly or formally, or were designed to promote disloyalty or disaffection, or had a reasonable probability of causing prejudice to good order and discipline among the troops or, in fact, made a single person disloyal or disaffect (R. 2617-18 and *passim*);

2. On additional Charge I, there was no evidence that appellant so dishonored or disgraced himself that his own character was seriously compromised, or that he so offended against decorum as to disgrace himself as a man, or that he brought dishonor or disrepute upon the military profession or that he was morally unbecoming and unworthy. In addition, the Law Officer's instruction was confusing, prejudicial, and misleading in that it purported to allow a finding of guilt based on standards other than those heretofore enumerated (R. 2597 and *passim*), in violation of the UCMJ, Article 51(c) and the due process clause of the Fifth Amendment of the Constitution of the United States;

3. And regarding Charge II and additional Charges I, II, and III, the alleged statements were protected by Army Regulation 600-20 Paragraph 42, which provides that soldiers retain their right to express their opinions privately and informally on all political subjects.

The Board of Review erred in upholding appellant's conviction having failed to show that statements made by him represented a clear and present danger to good order and discipline in the Armed Forces in violation of the First Amendment and the due process clause of the Fifth Amendment of the Constitution of the United States. (R. 2617-18, and *passim*)

Assignment of Error No. 3

The Board of Review erred in upholding the Law Officer's ruling that the truth or falsity of statements allegedly made by appellant was not an issue and that truth constituted neither justification for nor a defense to Charge II and additional Charges I, II, and III in violation of the First and Fifth Amendments of the Constitution of the United States. (R. 874-77, 2109).

Assignment of Error No. 4

The Board of Review erred in upholding the Law Officer's denial of accused's motion to dismiss Charge II purporting to cite an offense under Article 134, UCMJ, the area of regulation having been preempted by 18 U.S.C. § 2387 (R. 112-15, 126).

Assignment of Error No. 5

The Board of Review erred in upholding the Law Officer's failure to dismiss Charges II, and additional Charges I, H, and III (the "Speech Charges") on the following grounds:

1. Articles 133 and 134 UCMJ (which provide no maximum punishment) and 18 U.S.C. § 2387 under which the speech charges were laid, the charges themselves and the specifications thereunder, are vague and overbroad and void therefore both facially and in their application (R. 137-8, 145-80, 208).

2. Articles 133 and 134 UCMJ failed to apprise appellant of the appropriate standard of conduct required of him, nor was he so apprised by the Army, and, without such notice, he could not be held accountable (R. 2229, 2479-98, 2617-18). All in violation of the First, Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 6

The Board of Review erred in upholding the appellant's conviction, his court-martial being a selective application of military law to silence his expression of dissent over United States policy in Vietnam, in violation of his right to free speech guaranteed by the First Amendment and the equal protection and due process of law guaranteed

by the Fifth Amendment of the Constitution of the United States.

Assignment of Error No. 7

The Board of Review erred in upholding the Law Officer with regard to additional Charges II and III (the "Letter Charges") in that:

1. He failed to dismiss the letter charges on the ground that they constituted an accumulation of charges prohibited by MCM para. 25 at 28, the prosecution having had the document upon which the charges were based substantially prior to the lodging of additional Charge I (R. 94-102);
2. He overruled appellant's motion to dismiss the letter charges or, to remand for an additional Article 32 investigation, which was based on the ground that although the recipient of the letter was totally subject to Army control and could have been provided as an Article 32 witness, he was not so provided, despite repeated requests for him in violation of appellant's rights as provided by the UCMJ and MCM (R. 89-92, 94, 126).
3. He ruled that he would deny a motion for finding of not guilty on these charges even though the evidence was undisputed that (A) the recipient of the letter was not aware that its sender was an officer, (B) no evidence of an intention to make disloyal or disaffect was adduced (C) and the letter was written in response to a request of a friend of the recipient's and was, in fact, in response to a letter from him;
4. He should have dismissed the letter charges since they were totally invalid under AR 600-20;

in violation of the due process of law, fair trial, cross-examination, confrontation and notice provisions of the Fifth and Sixth Amendments of the Constitution of the United States. These errors were extremely harmful to appellant in that they resulted in the presentation to the court-martial of highly prejudicial matter (the letter and its contents), thereby depriving appellant of a fair trial on all charges, due to their consolidation for trial and the failure to grant a severance.

Assignment of Error No. 8

The Board of Review erred in upholding the Law Officer's:

1. Overruling of accused's motion to dismiss Charge II and additional Charge III citing offenses under Article 134 UCMJ for "attacking the war aims of the United States," no

The Board of Review erred in upholding the Law Officer's ruling as a matter of law that appellant had not produced any evidence that the Special Forces of the United States Army were engaged in a pattern or practice of committing war crimes, thereby rendering the order to train Special Forces aidmen which formed the basis for Charge I unlawful on the ground that such trainees would become so engaged or utilize their medical training in an unlawful manner. It further erred in upholding the Law Officer's refusal to allow the court-martial to hear evidence on this issue, appellant having made a prima facie showing of the illegality of the order to train aidmen. (R. 1049)

Assignment of Error No. 9

The Board of Review erred in upholding the Law Officer's failure to dismiss or to properly instruct the court under Charge I that the order to appellant to institute a Phase II training program for Special Forces Personnel was unlawful and the court erred in failing to so find under the First, Fourth, Fifth and Ninth Amendments of the Constitution of the United States, The Order:

1. Required appellant to teach the Art of Medicine to unqualified Combat rather than Medical Personnel;
2. Required appellant to teach medicine to those who planned to use it for purely Military and Political ends;
3. Jeopardized the confidentiality of the Physician-Patient Relationship;
4. Was in violation of an applicable Army Regulation, an applicable technical bulletin and the requirements of good medical practice based thereon; and
5. Violated accepted standards of ethical Medicine and Oaths prescribed therefor.

Assignment of Error No. 10

The Board of Review erred in upholding the Law Officer's ruling as a matter of law that appellant had not produced any evidence that the special forces of the United States Army were engaged in a pattern or practice of committing war crimes, thereby rendering the order to train special AidMen which formed the basis for Charge I unlawful on the ground that such trainees would become so engaged or utilize their medical training in an unlawful manner. It further erred in upholding the Law Officer's refusal to allow the court-martial to hear evidence on this issue, appellant having made a *prima facie* showing of the illegality of the order to train AidMen (R. 1049).

Assignment of Error No. 11

The Board of Review erred in upholding the Law Officer's failure to grant appellant a severance of the charges and separate trials thereon in that:

1. Charge I was unrelated to the remaining 4 charges (the "Speech Charges"), each of which dealt with appellant's highly controversial views;

2. The controversial nature of appellant's political views must, of necessity, have prejudiced the judgment of the members of the court regarding appellant's guilt or innocence under Charge I and the punishment to be provided therefor;

3. Had appellant testified as to either Charge I or the Speech Charges, but not as to both of them, he would have further prejudiced his defense on one or the other or both of them, the result of the Law Officer's error effectively being to deprive appellant of his right to testify on his own behalf and his rights to the due process of law and fair trial guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States. (R. 102-104; 2354-2355)

Assignment of Error No. 12

The Board of Review erred in upholding the Law Officer's failure to dismiss the charges on the grounds that they were facially and factually *ex post facto* laws and bills of attainder or pains and penalties (R. 203-206, 208).

Assignment of Error No. 13

The Army amassed a 180 page G-2 dossier against appellant. The general court-martial by appellant's accuser was based upon a review of that dossier. Thus the Board of Review erred in upholding the Law Officer in:

1. Denying appellant and his individual counsel access to more than 100 pages of the dossier;
2. Providing the entire dossier to military defense counsel only under the condition that he not divulge to civilian counsel more than the 80 pages thereof released by the Army (R. 56-81; 125-26);
3. Reviewing the dossier *in camera* (R. 86-89);
4. Failing to hold, based *inter alia* on said dossier, that the court-martial was but a device or ruse to rid the Army of an unorthodox thinker, the charges being purely political in origin and based on preservice activities (R. 69-81);
5. Refusing to dismiss the charges on the foregoing grounds upon motion therefor (R. 130-36);
6. Failing to cause the entire G-2 dossier to be made an exhibit to the appellate record (R. 215, 838);

thereby depriving appellant of the rights to free speech, due process of law; to be informed of the nature and cause of the accusation against him; to be confronted by witnesses against him; to have the effective assistance of counsel of his own choosing; the right of compulsory process, and cross-examination and discovery as guaranteed by the Uniform Code of Military Justice, the Manual for Courts-Martial and the First, Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 14

The Board of Review erred in upholding the Law Officer's overruling of accused's objection to:

1. Being tried by a panel of officers in rank superior to him resulting in his being tried by career officers rather than his peers (R. 36-38); from which medical officers were excluded by AR 40-1 para. 9b (R. 36-38); and from which women were systematically excluded (R. 138-45, 208, 213-14);

2. Court member selection without standards and at the sole and absolute discretion of the same commanding general who ordered the court-martial convened (R. 144-45), each of whom was subject to his command, disciplinary and promotional authority (R. 38-40);

3. Who decide whether one of their fellow members is to be disqualified for cause (R. 42-43) contrary to the due process of law and impartial trial guarantees of the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 15

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for a trial by jury in violation of the Fifth and Sixth Amendments of the Constitution of the United States (R. 136-37).

Assignment of Error No. 16

The Board of Review erred in upholding the Law Officer's overruling of:

1. Appellant's objection to the trial counsel's conducting the opening of court, administering of oaths and performance of other administrative duties, all of which place the prosecuting attorney in a preferred position of trust in the eyes of the members of the court, the disparity being exacerbated by reflections upon the understanding of individual counsel and continual re-identification of appellant as the accused (R. 38-40 2145, 2185, 2192, 2248);

2. Appellant's objection to the requirement that the names of those witnesses the defense desired to subpoena be provided the trial counsel who has the power to issue subpoenas for his own witnesses without a showing of relevancy therefor being made, the defense counsel having no such power and, in fact, being required not merely to disclose the names of his witnesses to the prosecution but, more importantly, demonstrate their relevancy and thereby disclose his defense in advance of trial, all of this placing an unequal burden on the defense; (R. 51-56)

In violation of the due process of law, compulsory process and confrontation and fair and impartial trial provisions of the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 17

The Board of Review erred in upholding the Law Officer in:

1. Denying appellant a mistrial based upon the Law Officer's suggestion in the presence of the members of the court that individual counsel "should withdraw from the case" and in
2. His providing a subsequent instruction to the court members, over appellant's objection, that his previous remarks be disregarded,

the prejudicial effect of those remarks being ineradicable from the minds of the court members, the instruction that they be disregarded serving merely to reemphasize the prejudice and to further deprive appellant of his rights to due process of law, the effective assistance of counsel and a fair trial as guaranteed by the Fifth and Sixth Amendments of the Constitution (R. 2191-93).

Assignment of Error No. 18

The Board of Review erred in upholding the Law Officer's overruling of accused's motion that trial counsel be disqualified pursuant to Article 27(A), UCMJ, and paragraph 64, Manual for Courts-Martial, trial counsel having participated in the case previously as investigating officer. (R. 184-201)

Assignment of Error No. 19

Reversible error occurred with reference to the participation of the Staff Judge Advocate in that:

1. The Law Officer erred in overruling appellant's objection that the Staff Judge Advocate (a) conferred with and advised the charging officer to the extent that he became a de facto accuser, (b) appointed counsel for both sides, and (c) made recommendations to the convening authority to proceed by court-martial (R. 46-47); and
2. The Staff Judge Advocate, after participating as aforesaid, and being subject to the command influence of the convening authority, participated in post trial review,

all to the prejudice of appellant and in violation of UCMJ Arts. 6, 34, and 61 and the due process and impartial trial guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 20

The Board of Review erred in upholding the Law Officer's overruling of appellant's objection to the appointment by the convening authority of an Article 32 investigating officer subject to the command, promotional and disciplinary authority of such convening authority, thereby depriving appellant of a fair and impartial Article 32 investigation in violation of the due process clause of the Fifth Amendment of the Constitution of the United States (R. 44, 46-47).

Assignment of Error No. 21

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for change of venue based upon the prejudice and intimidation of Fort Jackson witnesses who could testify on accused's behalf, in violation of the due process clause of the Fifth Amendment and the fair trial provisions of the Sixth Amendment of the Constitution of the United States. (R. 2242, 2245-46)

Assignment of Error No. 22

The Board of Review erred in upholding the Law Officer's failure to declare a mistrial, or in the alternative to order a new trial, on the grounds that during the course of accused's trial the public information officer at Fort Jackson circulated a brochure attempting to rebut an article written by Donald Duncan, a witness for the defense, circulation of such brochure or pamphlet tending to intimidate and discredit the testimony of Donald Duncan thereby depriving accused of a fair trial in violation of the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2246-48)

Assignment of Error No. 23

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for a mistrial on the grounds

that prior to its retirement for sentence Major Boyd D. Parsons, Sr., made statements in open court and in the presence of all other members of the court regarding a telephone call he had received at 12:30 A.M., June 3, 1967, of a threatening or crank nature, such statements related by Major Parsons being so highly prejudicial to accused and impossible of erasure from the minds of the other members of the court as to deprive accused of rights guaranteed by the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2632-33)

Assignment of Error No. 24

The Law Officer erred in overruling accused's objection to the conduct of his Article 32 investigation in secrecy, the press being excluded therefrom in spite of the accused's request that they be present, in violation of the due process clause of the Fifth Amendment and the public trial guarantee of the Sixth Amendment of the Constitution of the United States (R. 47, 125).

Assignment of Error No. 25

The Board of Review erred in upholding the Law Officer's ruling that the testimony of Colonel Richard L. Coppedge was inadmissible except as to extenuation and mitigation, and by further ruling inadmissible as to extenuation and mitigation the testimony of Colonel Coppedge concerning the possible effects upon morale and discipline in the Army of accused being sentenced to confinement, in violation of the rules of evidence and the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2539)


Assignment of Error No. 26

The Board of Review erred in upholding the Law Officer's overruling of accused's motion that he be provided with copies of statements from certain enlisted personnel accused allegedly conversed with, such statements having been compiled by trial counsel and withheld from accused in violation of his rights of discovery under the UCMJ and MCM, and the suppression thereof being in violation

of the due process clause of the Fifth Amendment and the fair trial provisions of the Sixth Amendment. (R. 202)

Assignment of Error No. 27

The Board of Review erred in upholding the Law Officer's failure to give defense proposed instructions 1 through 14 in their entirety. (R. 2525-27, Appellate Exhs. 24, 25).



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,

PETITIONER,

v.

JACOB J. PARKER, as Warden of
the United States Penitentiary,
Lewisburg, Pennsylvania, and
STANLEY R. RESOR, as Secretary
of the Army,

RESPONDENTS.

No. 1057 H.C.

[Filed Apr. 19, 1969]

T. H. Campion, Clerk
Per
Deputy Clerk

**MOTION FOR PRODUCTION
OF DOCUMENTS**

Petitioner Howard B. Levy moves the Court for an order or appropriate writ requiring respondents to produce and permit inspection by Counsel of the originals of each of the following sets of documents at a time and place to be specified by (and under the terms and conditions of) an appropriate order to be entered by the Court.

Petitioner further moves the Court to require respondents to furnish copies of said documents to Petitioner's Counsel or to allow such Counsel to reproduce said documents by photographic or other means.

I. This Motion is based upon:

1. This Court's power to see that "law and justice" are done, 28 U.S.C. § 2243;
2. The present intention of Petitioner to introduce the hereinafter described G-2 Dossier, in toto, in evidence in this proceeding;
3. The inherent power of the Court to order production;
4. The entire G-2 Dossier is essential proof of the denial to Petitioner of his first, fourth, fifth, sixth and ninth amendment rights;
5. Additionally the G-2 Dossier and the other documents (questionnaires hereinafter described) hereby sought are subject to production for discovery purposes under:

- (a) the inherent power of the Court to order discovery;
- (b) the provisions of 28 U.S.C. § 2243;
- (c) the provisions of 28 U.S.C. § 2246;
- (d) the provisions of 28 U.S.C. § 1651;
- (e) Fed. R. Civ. P. 34;
- (f) Fed. R. Crim. P. 16(b)

II. The sets of documents sought are:

- (1) the G-2 Dossier (intelligence dossier referred to in the petition for writ of habeas corpus filed herein and in court-martial proceedings styled *United States v. Captain Howard B. Levy*, (No. CM 416463)) consisting of approximately 180 pages; and,
- (2) the approximately 450 questionnaires forwarded to military personnel or others by the Government (with written responses thereon or replies thereto, if any), during or prior to said Court-martial proceedings. The questionnaires were utilized for the purpose of eliciting evidence and possible witnesses to the words allegedly uttered by Petitioner or for the purpose of ascertaining his political or other views on racial and Vietnam questions or otherwise.
- (3) the correspondence or other records; documents or files in the possession of the Government relating to Dr. Levy and not contained in items (1) and (2) above but which relate thereto.

III. Respondent Resor, as Secretary of the Army, has the possession, custody or control of the foregoing.

IV. The documents and other matter are relevant on the following grounds:

- (1) the Special Agent who compiled the Dossier or a major portion thereof (the entire Dossier being compiled by him and his co-workers) on or about October 2, 1966, caused the issuance of an order to Dr. Levy with the disobedience of which he was later charged under Article 15, UCMJ, 10 U.S.C. § 815, which provides for but minor and non-judicial punishment.
- (2) Col. Henry Franklin Fancy, Dr. Levy's com-

- manding officer, later elevated the Article 15, *supra*, charges to General Court-Martial level based upon his reading of the entire Dossier.
- (3) prior to and at trial the Government withheld and suppressed approximately 100 pages of said Dossier from Dr. Levy's Chief Defense Counsel, the undersigned Charles Morgan, Jr., revealing to him but 80 of 180 Dossier pages. Repeated demands were made for the production of the entire Dossier they being based on the first, fourth, fifth and sixth Amendments of the Constitution of the United States. The Government contended that the suppressed portions of the Dossier were of a classified nature and that it was acting in compliance with the Jencks Act, 18 U.S.C. § 3500. Chief Defense Counsel for Dr. Levy specifically rejected the Jencks Act, *supra*, as the grounds for production of the documents relying instead on Constitutional guaranties, thereby complying with the mandate of *United States v. Augenblick*, 89 S. Ct. 528 (1969). He additionally represented that he could obtain an appropriate security clearance.
 - (4) Military Defense Counsel, assistant counsel in the trial, was allowed to view the entire Dossier as were Prosecutors, the Colonel who instituted the charges, that Colonel's Executive Officer, and the Law Officer.
 - (5) Military Defense Counsel, assistant counsel in the trial, was not allowed to request agent's statements from the Dossier, and was not allowed to, nor did he, reveal to Chief Defense Counsel the matter contained in the Dossier's suppressed 100 pages. The matter contained in the Dossier was classified no higher than "Confidential." See Exhibit C, Affidavits, 50.
 - (6) the very charges against Dr. Levy having been based on the Dossier, a specific rejection of the Jencks Act, *supra*, and representations having been made by said Chief Defense Counsel that the charges against Dr. Levy were based in part on his pre-service political activity *Cf. Harmon*

v. Brucker, 355 U.S. 579 (1958), and, additionally, his racial and political views *Cf. United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967)¹ the following occurred after trial and exhaustion of all intra-military remedies herein:

Chief Defense Counsel, Charles Morgan, Jr. applied for clearance to review the Record of another trial by Court-martial. On February 25, 1969, said counsel was granted the appropriate security clearance. Matter contained in that Record is classified "Top Secret," the Army's highest security designation. See Exhibit C, Affidavits, 133. The same clearance was granted associate counsel herein, Reber F. Boulton, Jr., Esq.

- (7) although a request was made that a copy of the entire G-2 Dossier, sealed, if necessary, be made a part of the Record for appellate purposes this was not done.
- (8) approximately 450 questionnaires were mailed by the Government—petitioner is informed and believes that this was done even prior to the convening of the Court-martial—to sundry military and non-military personnel including Dr. Levy's patients. Many of these forms were filed out in the handwriting of the recipients thereof and returned to the Government. The defense sought these documents in order to demonstrate Dr. Levy's innocence of the four pure speech charges which were based upon his having made statements "publicly" to "divers" persons. The Government provided only

¹ See particularly the Additional Separate Opinion of Madden, J., 383 F.2d at 27 discussing the fact that the prosecution had its genesis in the unpopularity, in the eyes of federal and local law enforcement officials, of Lenske's political views and activities. This was revealed by a "Special Agent's report," *id.* at 28, which two of the court members felt had not been properly introduced and hence could not serve as the basis for decision; nevertheless one of the other court members "shares [Judge Madden's] opinion," *id.* It was because the Agent's report was not properly made a part of the record that an earlier opinion, incorporating Judge Madden's additional opinion and published at 18 *Am. Fed. Tax R.* 5815 (1966), was withdrawn. See *id.* at 27.

the completed questionnaires of those persons it intended to use as witnesses relying on the Jencks Act, *supra*, which was not invoked the defense relying once again on constitutional grounds. The Government also professed a lack of knowledge as to whether it had in its possession matter which was privileged as work product or evidence and, no independent determination or examination of these documents was made even *in camera* and they too were suppressed. At trial the following was shown:

- (a) Petitioner had a minimum of 17,500 patient visits during each of his 2 years in the service;
 - (b) Of the approximately 13 "divers" Government witnesses to Dr. Levy's conversations only one of them had overheard or engaged in as many as 4 conversations during which Dr. Levy was supposed to have uttered forbidden words, and he had worked in his clinic for more than a year, one other witness had talked with him on fewer occasions, and several had participated in but a single conversation.
- (9) Throughout the trial and pre-trial proceedings Dr. Levy sought to subpoena G-2 and Judge Advocate officers with whom the charging officer, Col. Fancy, had conferred—with one of them 12 times about Dr. Levy himself. Certain notes of persons who were produced at trial as witnesses had been "destroyed" or "burned." The correspondence or documents or other records in the possession of the Government which are not included in the sets of documents sought in II (1) and (2) may be as relevant, if not more, to the matter at issue than the sets of documents otherwise sought.

V. Further grounds for production of the documents here sought appear on the face of the Petition for Writ of Habeas Corpus filed herewith, the Brief filed herein and in Exhibit B, thereto, the Affidavits,

and the Appendices filed herewith. In addition to the matter set forth in the Brief in this cause a separate memorandum of authorities relating to this motion is attached hereto.

s/ Charles Morgan, Jr.
CHARLES MORGAN, JR., Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,
PETITIONER,

v.

JACOB J. PARKER, as Warden
of the United States Penitentiary,
Lewisburg, Pennsylvania, and
STANLEY R. RESOR, as Secretary of the Army,

RESPONDENTS.

NO. _____

*Additional Memorandum Regarding
the
Production of Documents*

Other than the grounds set forth in the Motion for Production of Documents the following is applicable:

. . . [W]hen the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require" . . . it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced

* * *

. . . . [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. *Harris v. Nelson*, 37 U.S.L.W. 4219, 4223 (U.S. Mar. 24, 1969)

See also *Kaufman v. United States*, 37 U.S.L.W. 4238 (U.S. Mar. 24, 1969). *Alderman v. United States*, 37

U.S.L.W. 4189, 4195 (U.S. Mar. 10, 1969), a fourth amendment case requiring production of materials, states:

. . . the trial court can and should, where appropriate, place petitioner and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.

But this is not merely a fourth amendment case. The first, fifth, sixth, and ninth amendments are also involved. Decisions subsequent to *Alderman* are not restrictive of counsel's rights, no matters of national security can be plausibly asserted, and this Court's order should issue to see that law and justice are done.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,

PETITIONER,

v.

JACOB J. PARKER, as Warden of
the United States Penitentiary,
Lewisburg, Pennsylvania, and
STANLEY R. RESOR, as Secretary
of the Army,

RESPONDENTS.

No. 1057 H.C.

DISCLOSURE OF INFORMATION OBTAINED
BY EAVESDROPPING

Petitioner moves, pursuant to Federal Rule of Criminal Procedure 16, (including the continuing duty of disclosure as provided by Rule 16(g)), the inherent power of this court to require discovery, disclosure and production of documents, and the first, fourth and sixth amendments and the due process and self-incrimination clauses of the fifth amendment of the Constitution of the United States, for an order requiring the United States through the United States Attorney for the Middle District of Pennsylvania and military counsel assigned to this case and any other proper officer(s) or official(s) of the Government to produce and permit the petitioner and his counsel to inspect and copy all records, memoranda, and other writings, recordings, or other electronic surveillance of the petitioner, his place of work or residence or any other place frequented by him including but not limited to hotels or motels, and of attorneys, or conversations to which he or they participated in and the use, transmission, and disposition thereof (if any such surveillance has occurred prior to the filing of this motion). Such disclosure shall include but not be limited to production of the following without regard to the legality of the surveillance:

1. The logs of the conversations, showing by whom and by what agency such logs were compiled.
2. The actual tapes or other recordings of the conversa-

tions and transcriptions thereof whether by stenographic or other means and the names of the persons and agencies who monitored the conversations.

3. The names of the persons participating in the conversations which were overheard.

4. The dates, times, and durations of the conversations overheard.

5. The place or places at which the surveillance took place and the methods or techniques and electrical, electronic, or other devices used.

6. The duration of the surveillance of each place or person.

7. The names of all persons and agencies who had access to the information obtained by the surveillance whether or not such information was actually transmitted to them, as well as the names of the persons or agencies to whom the information was actually transmitted.

8. A detailed specification of the purpose of the surveillance.

9. The uses to which the information obtained was put.

10. The names of persons and agencies who have had custody, control, or access to the recordings, logs and summaries and the dates of such custody or control.

11. All communications pertaining to such surveillance and all memoranda prepared in connection therewith and any warrants or other written authorizations providing for the conduct of the surveillance.

12. No showing of relevance is necessary under *Alderman v. United States*, 89 S. Ct. 961 (1969) to require the disclosure of information gained as a result of electronic or other illegal surveillance. And, in any event, the fact of the surveillance must be disclosed so that the determination of whether the surveillance was lawful or, if unlawful, whether the conviction of petitioner was tainted thereby can be made.

13. If such matter exists petitioner requests that it be disclosed to his counsel of record and not filed in open court in these proceedings.

14. Disclosure of the matter sought by this motion (if any such matter exists) is necessary to assure defendant's rights to: be free from unreasonable searches and seizures guaranteed by the fourth amendment of the Constitution of

the United States; the due process and equal protection of law guaranteed by the fifth amendment; the fair trial guaranteed by the fifth and sixth amendments; know the nature and cause of the accusation; confrontation; compulsory process; have the adequate assistance of counsel; and to protect the freedom of speech, and assembly guaranteed by the first amendment thereof. Additionally such disclosure is required in order that the petitioner not be deprived of his right to a judicial trial as guaranteed by Article III, Section 2 of the said Constitution. The materials are available under Federal Rule of Criminal Procedure 16(b) and to the extent that it is a "written or recorded statement . . . made by the defendant . . ." under Rule 16(a).

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Of Counsel

Protective Order of Production

To counsel of record for the respondents in this cause:

You are hereby ordered to disclose the matter sought in the above and foregoing Motion for Disclosure of Information Obtained by Eavesdropping to counsel of record for the petitioner herein and to no other persons. Such disclosure shall be made at a time and place mutually convenient to counsel for the parties. In no event is any of the matter so disclosed to be filed in this Court or otherwise made public without obtaining the prior approval of this Court.

If none of the matter sought in said Motion exists then you are hereby ordered to certify that fact to this Court in writing with service of a copy of such certification upon petitioner's counsel of record.

Entered this the — day of July, 1969.

MICHAEL H. SHERIDAN
Chief Judge
United States District Court

SUPREME COURT OF THE UNITED STATES

No. 73-206

JACOB J. PARKER, Warden, et al.,
Appellants,

v.

HOWARD B. LEVY

APPEAL from the United States Court of Appeals for the Third Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is set for oral argument in tandem with No. 72-1713.

October 23, 1973

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	4
Statement	4
The questions are substantial	9
Conclusion	16
Appendix A	1a
Appendix B	96a
Appendix C	98a
Appendix D	105a

CITATIONS

Cases:

<i>Avrech v. Secretary of Navy</i> , No. 71-1841, C.A.D.C., decided March 20, 1973	10
<i>Carter v. McClaughry</i> , 183 U.S. 365	11
<i>Civil Service Commission v. Letter Carriers</i> , No. 72-634, decided June 25, 1973	12
<i>Dynes v. Hoover</i> , 20 How. 65	11
<i>Levy v. Parker</i> , 396 U.S. 1204	2
<i>Screws v. United States</i> , 325 U.S. 91	15
<i>Secretary of Navy v. Avrech</i> , No. 72- 1713	10
<i>Smith v. Whitney</i> , 116 U.S. 167	11
<i>Swaim v. United States</i> , 165 U.S. 553	11
<i>United States v. Fletcher</i> , 148 U.S. 84	11

II

Cases—Continued	Page
<i>United States v. Frantz</i> , 2 U.S.C.M.A. 161	11
<i>United States v. Guest</i> , 383 U.S. 745	15
<i>United States v. Holiday</i> , 4 U.S.M.C.A. 454	12, 14
<i>United States v. Howe</i> , 17 U.S.C.M.A. 165	11, 12, 13, 14
<i>United States v. Levy</i> , 39 C.M.R. 672	4, 7
<i>United States v. Sadinsky</i> , 14 U.S.C.M.A. 563	12

Constitution and statutes:

Constitution of the United States, First Amendment	8, 13
--	-------

Uniform Code of Military Justice:

Art. 90, 10 U.S.C. 890	2, 3, 4, 5, 7, 9, 10, 11, 15, 16
Art. 133, 10 U.S.C. 933	2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
Art. 134, 10 U.S.C. 934	2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
50 U.S.C. App. 454	4

Miscellaneous:

Manual for Courts-Martial (1969)	8, 11, 12, 13
Stern & Gressman, <i>Supreme Court Prac-</i> <i>tice</i> , § 2.5 (4th ed.)	2
Wiener, <i>Are the General Military Articles</i> <i>Unconstitutionally Vague?</i> , 54 A.B.A.J. 357 (1968)	12, 15

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

JACOB J. PARKER, ET AL., APPELLANTS

v.

HOWARD B. LEVY

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The memorandum opinion of the district court, filed on June 30, 1971 (App. C, *infra*), is not reported.

JURISDICTION

Appellee Howard B. Levy ("Levy") filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging the validity of his court-martial conviction under

Articles 90, 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933 and 934. The district court denied the petition on June 30, 1971, and Levy appealed.

On April 18, 1973, the United States Court of Appeals for the Third Circuit entered a judgment of reversal (App. B, *infra*), together with an opinion holding that Articles 133 and 134 are unconstitutionally vague and that joint consideration of the Article 90 charges with the charges under Articles 133 and 134 prejudiced Levy's right to a fair trial under Article 90. A notice of appeal to this Court (App. D, *infra*) was filed with the court of appeals on May 16, 1973. By order of July 13, 1973, the Chief Justice granted appellants an extension of time for docketing this appeal to and including July 30, 1973.

This Court has jurisdiction to review the decision of the court below by way of appeal pursuant to 28 U.S.C. 1252, since a court of the United States has entered a judgment in a civil action to which an officer of the United States is a party holding an Act of Congress unconstitutional. See Stern and Gressman, *Supreme Court Practice*, § 2.5 (4th ed.).¹

STATUTES INVOLVED

Article 90 of the Uniform Code of Military Justice (10 U.S.C. 890) provides:

¹ Levy's sentence was due to expire on August 14, 1969. On August 2, 1969, Mr. Justice Douglas ordered that Levy be admitted to bail. 396 U.S. 1204.

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

Article 133 of the Uniform Code of Military Justice (10 U.S.C. 933) provides:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

1. Whether Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, are, on their face, unconstitutionally vague.

2. Whether Articles 133 and 134, as applied to the conduct in this case, are unconstitutionally vague.

3. Whether, on the assumption that Articles 133 and 134 were properly held unconstitutional below, appellee was denied a fair trial on an Article 90 charge, for the direct disobedience of a lawful order, because of the introduction of evidence on charges under the unconstitutional articles.

STATEMENT

On June 2, 1967, appellee Howard B. Levy, then a captain in the United States Army, was convicted by general court-martial of violations of Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933, and 934. Captain Levy had entered the Army under the "Berry Plan" (see 50 U.S.C. App. 454), under which he agreed to serve for two years if permitted first to complete his medical training. See *United States v. Levy*, 39 C.M.R. 672, 675. From the time he was called up until his court-martial, Captain Levy was assigned as chief of the dermatology service, U.S. Army Hospital, Fort Jackson, South Carolina.

Article 90 provides for punishment of anyone subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer." The

specification under Article 90 alleged that Captain Levy willfully disobeyed a colonel's command "to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne)*, 8-R-F16, *Dermatology Training * * **" (App. A, *infra*, p. 2a).

The uncontroverted evidence admitted under the Article 90 specification showed that one mission of the hospital to which appellee Levy was assigned was to train special forces aidmen (Tr. 221-223, 232).² Each student was scheduled to spend two hours per day for one week in the dermatology clinic to receive training in the identification and treatment of certain skin disorders and diseases (Tr. 228, 232). As chief of the dermatology service, Captain Levy had the responsibility to conduct this training (Tr. 228-232). During early 1966 he did so, and he continued through the summer, but with increasing irregularity and incompleteness (Tr. 228-230, 527, 541, 556). In late summer the hospital commander, Colonel Fancy, received reports that the dermatological training of the students was totally unsatisfactory, and his investigation verified that fact (Tr. 229-231). Colonel Fancy personally handed Captain Levy a written order to conduct the required training. Levy read the order, stated that he understood it, but announced that he would not obey it because of his medical ethics (Tr. 232, Pros. Ex. 2). He was told that obedience was nevertheless expected (Tr. 233). Cap-

² "Tr." refers to the transcript of the court-martial trial, which is part of the record below.

tain Levy persisted in his refusal and refused to have others conduct the training for him (Tr. 528, 529, 532, 545). His enlisted subordinates offered to conduct the necessary training in the dermatology clinic, but Captain Levy ordered them not to conduct the training and threatened to punish them if they disobeyed his order (Tr. 531, 537). He was determined that the student aidmen would not receive any training in any area of his responsibility and used his rank as an officer to carry out that determination.

Article 133 provides for punishment of "conduct unbecoming an officer and a gentleman." Article 134 proscribes, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." The evidence established that during 1966, upon a great many occasions, while on duty in the dermatology clinic, Captain Levy initiated and engaged in conversations, many of them completely one-sided, with aidmen in training, patients, and visitors. His remarks were directed to enlisted personnel, most of them black, and the court of appeals cited the following example as illustrative (App. A, *infra*, pp. 3a-4a):

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam. They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the

United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

These remarks, and many others in a similar vein, were made by an officer on duty, to enlisted personnel, in a crowded and busy clinic that averaged a daily case load of some 50 to 70 military and civilian patients. *United States v. Levy, supra*, 39 C.M.R. at 674-675.

Captain Levy was convicted under Article 90 of willful disobedience of the lawful command of his superior officer. He was also convicted under Articles 133 and 134 of uttering public statements designed to promote disloyalty and disaffection among the troops and, further, of "wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful and disloyal statements" to enlisted personnel. He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor. Levy exhausted his appeals within the military system and sought relief in the federal civilian courts before, during, and after the military proceedings against him (*id.* at 6a-7a).

Levy ultimately filed a petition for habeas corpus in the United States District Court for the Middle

District of Pennsylvania. The petition alleged a variety of procedural, evidentiary, and constitutional errors, including the claim that Articles 133 and 134 are unconstitutionally vague. The district court denied the petition in a memorandum opinion and order (App. C, *infra*, pp. 98a-104a).

The court of appeals reversed. In a lengthy opinion, the court first analyzed Articles 133 and 134 (commonly known as the "General Articles") and found them impermissibly vague and lacking in the expression of specific standards by which the lawfulness of particular forms of conduct could be measured (App. A, *infra*, pp. 31a-45a). Although the court recognized that Captain Levy's conduct fell within the explicit description of the ambit of Article 134 contained in the *Manual for Courts-Martial* (1969),³ which is promulgated by the President by executive order, it concluded that the possibility that the provision could be applied to conduct within the area of protected First Amendment expression was sufficient to confer standing on Levy to challenge potential vagueness of the provisions as they might be applied to others (*id.* at 45a-47a). The court concluded its discussion of the General Articles by declaring that its decision should be afforded prospective effect, except as to persons who have asserted and preserved the constitutional claim and currently have such a claim pending in the military judicial system or the federal court system (*id.* at 51a).

³ The court appended to its opinion lengthy excerpts from the *Manual* defining the scope and content of Article 134 (App. A, *infra*, pp. 60a-83a).

The court also overturned Captain Levy's conviction for willful disobedience of a valid order, in violation of Article 90, because it concluded that the joint trial of that charge with the charges under the General Articles created a "reasonable possibility" of prejudice, so that a new trial was required (*id.* at 51a-59a). Chief Judge Seitz dissented from this portion of the court's holding. He stated that the court applied the wrong standard in reviewing the joinder problem—the standard, in his view, should have been one of "substantial prejudice" rather than "reasonable possibility of prejudice"—and that, regardless of the standard, the evidence of Captain Levy's guilt on the Article 90 charge was so overwhelming that habeas corpus relief was inappropriate (*id.* at 84a-95a).

The court of appeals remanded the case to the district court for the issuance of the writ of habeas corpus unless within 90 days the military authorities granted Captain Levy a new trial on the Article 90 charge (App. B, *infra*, pp. 96a-97a). The government has filed an application with the court of appeals for a stay of its mandate pending appeal to this court, which application is pending at the present time.

THE QUESTIONS ARE SUBSTANTIAL

The court of appeals has held unconstitutional acts of Congress that form important parts of the Uniform Code of Military Justice, having their roots in statutes antedating the adoption of the Constitution itself and reenacted by Congress as recently as 1956. One

of these provisions, Article 134, has recently been struck down for vagueness by the District of Columbia Circuit in *Avrech v. Secretary of the Navy*, No. 71-1841, decided March 20, 1973. The government has appealed to this Court from that decision (*Secretary of the Navy v. Avrech*, No. 72-1713). The instant case provides an additional factual situation in which to judge the validity of Article 134, as well as an occasion to evaluate the companion statute, Article 133, in the face of similar challenges, and to judge the legality of the joinder of charges, in this case the joinder of the Article 90 charge.

If allowed to stand, the decision below—like that in *Avrech*—would create a profound disruption of the orderly administration of justice within the military. Indeed, should the ruling below be applied retroactively, contrary to the views of the court of appeals, the number of convictions affected would run into the thousands. Moreover, there are substantial areas of misconduct that require regulation by the military justice system but that are not specifically proscribed in other provisions of the Uniform Code because they have long been deemed covered by the General Articles. The decision below thus leaves a substantial and serious gap in the military justice system.

As the court of appeals recognized (App. A, *infra*, pp. 20a-22a), Articles 133 and 134, which it has declared unconstitutionally vague on their face, are traceable to pre-Revolutionary British military law and in one form or another have been part of Amer-

ican military codes since the beginnings of the Republic. Such provisions were first adopted by the Continental Congress in 1775, prior to the Declaration of Independence, and enacted once more by that body in 1776. The enactment of 1776 was drafted by John Adams and Thomas Jefferson.

This Court has expressly upheld the predecessors of the present articles against attacks similar to the argument accepted below. *Smith v. Whitney*, 116 U.S. 167, 182-186; *Dynes v. Hoover*, 20 How. 65; *United States v. Fletcher*, 148 U.S. 84; *Swaim v. United States*, 165 U.S. 553; *Carter v. McClaughry*, 183 U.S. 365. The opinion below also conflicts with relatively recent decisions of the United States Court of Military Appeals. See, e.g., *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178, which concluded that the conduct prohibited by Article 133 is well-defined, and *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, which upheld Article 134, stating that it "must be judged * * * not in vacuo, but in the context in which the years have placed it."

Meaning and requisite precision have been given to Articles 133 and 134 by judicial construction, the illustrations given in the *Manual for Courts-Martial*, instruction regularly given to military personnel, the practical understanding of men engaged in a well-defined enterprise, and military practices and traditions extending back over centuries.

The strict judicial construction accorded these provisions substantially undercuts the vagueness objections. Article 134 has been construed to reach only

conduct "directly and palpably" prejudicial to good order, *United States v. Holiday*, 4 U.S.M.C.A. 454, 456, and the statutory reach of Article 133 has been limited to very serious offenses. See *United States v. Howe*, *supra*, 17 U.S.C.M.A. at 177-178. Both federal military courts and civilian courts have had frequent occasion to determine what kinds of conduct fall within these articles, and that body of case law provides the needed definition of the statutes' necessarily general language. See, e.g., *United States v. Sadinsky*, 14 U.S.C.M.A. 563; *United States v. Howe*, *supra*; Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

Further specificity is provided by the *Manual for Courts-Martial*, which is promulgated by the President of the United States by executive order. The *Manual* explains and illustrates the various offenses proscribed by the Code, and, as conceded by the court of appeals, the conduct engaged in by Captain Levy fell unequivocally within the scope of certain specific examples set forth in the *Manual's* description of conduct proscribed by Article 134 (App. A, *infra*, pp. 46a, 73a). Had Captain Levy desired to evaluate the lawfulness of his course of conduct, a short glance at the *Manual* would have resolved any doubts he might have entertained from a reading of the statutory provisions he attacks. Cf. *Civil Service Commission v. Letter Carriers*, No. 72-634, decided June 25, 1973. Captain Levy thus had adequate notice that his conduct violated the General Articles. His conduct was, in any

event, so obviously prejudicial to good order and discipline that any man of ordinary intelligence would have known it to violate Article 134 without reference to the *Manual*.

In essence, the court of appeals brushed aside the fact that Captain Levy's misconduct came within the core area of proscribed activity in order to allow him to assert potential vagueness claims that might arise in connection with other, hypothetical applications of the provisions in circumstances where vagueness problems might arise (App. A, *infra*, p. 46a). The court was led to this conclusion by the possibility that the provisions could theoretically be sought to be applied to activities protected by the First Amendment, and that the "chilling effect" doctrine was thus available to confer broad standing to raise the theoretical challenge (*id.* at 47a). It is clear, however, that the conduct of Captain Levy fell far outside the ambit of First Amendment protection, that the general thrust of the provisions in question is to forms of conduct entailing no First Amendment involvement, and that the provisions as construed and applied have no such impermissibly chilling effect on free speech as to justify the drastic remedy of facial invalidation.

The court below failed to accord due weight to the fact that Articles 133 and 134 are not addressed to a civilian society with widely varying sub-cultures and diverse mores. Rather, these articles are addressed to the specialized military community, which exists for very particular purposes. It is a community,

moreover, whose practices and traditions, widely known not only within the military but outside as well, have remained substantially intact for centuries. When Article 133 speaks of "conduct unbecoming an officer and a gentleman," it addresses the common understanding of the performance of duty expected of an officer. The court of appeals' rhetorical question, "In a society witnessing rapidly changing manners and mores, against what existing standard is gentlemanly conduct to be measured?" (App. A, *infra*, p. 42a), thus completely misses the essential point. There may be no agreed standard in civilian society, but the traditions, practices, and obvious organizational needs of the armed forces provide a clear and commonly understood standard for the military.

It is no answer to the specificity provided in these various ways to argue that one can imagine hypothetical cases that would be difficult to classify as either encompassed or not encompassed within the terms of Articles 133 and 134. That kind of objection can be made to almost any law. Articles 133 and 134 have a well-defined core meaning, and the *Holiday* and *Howe* decisions, *supra*, require that they be applied only in cases falling within that well-understood core.

Certainly the present case, involving direct incitement to disobedience uttered by an officer to enlisted men, falls within the core meanings of Articles 133 and 134, no matter how narrowly the articles are construed. Captain Levy could not have been unaware that his conduct was not what the Army ex-

pects and requires of its officers, nor could he have failed to realize that it was prejudicial to good order and discipline. These articles, therefore, are not unduly vague in their general meaning, and they are certainly not unduly vague in their application to this case.

A final safeguard is provided by the practical requirement that no member of the armed forces can be convicted under either Article 133 or 134 except for conduct that any reasonable person would know was wrong. Article 133 does not in terms require *mens rea*, but that requirement is, in practical effect, part of the statute. See Wiener, *Are the General Military Articles Unconstitutionally Vague?*, *supra*, 54 A.B.A.J. at 364. Many of the standard forms of specification under Article 134 require some form of *mens rea*, and the specifications in Captain Levy's case explicitly charged intent and required a finding of intent to convict. Cf. *United States v. Guest*, 383 U.S. 745, 754, 785-786 (holding that a scienter requirement can save a criminal statute from unconstitutional vagueness); *Screws v. United States*, 325 U.S. 91.

Whatever decision is reached with respect to the constitutionality of Articles 133 and 134, the conviction of appellee Levy under Article 90 for the willful disobedience of a lawful order should stand. Our reasons are essentially those set forth in the dissent below by Chief Judge Seitz, upon whose opinion we primarily rely. In our view, because the evidence supporting this charge was so overwhelming, the

Article 90 conviction should remain undisturbed whether the standard announced by the majority ("reasonable possibility of prejudice") or that applied by Chief Judge Seitz ("substantial prejudice") is employed. To reverse the Article 90 conviction on the facts of this case is virtually to proclaim unconstitutional the joinder of charges permitted by the Uniform Code of Military Justice, in many cases in which a defendant is acquitted on one charge. The practical result will be to require separate trials on charges that do not arise from the same transaction. That is not the procedure enacted by Congress, which has the constitutional authority to regulate such matters, and there is no reason to impose such a requirement upon the court-martial system.

CONCLUSION

Probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted.

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JULY 1973.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1917

HOWARD B. LEVY, APPELLANT

v.

JACOB J. PARKER, as Warden of the United States
Penitentiary, Lewisburg, Pennsylvania, and STAN-
LEY R. RESOR, as Secretary of the Army

*Appeal from the United States District Court
for the Middle District of Pennsylvania*

Before: SEITZ, Chief Judge, and ALDISERT and
ROSENN, Circuit Judges.

OPINION OF THE COURT

(Filed April 18, 1973)

ALDISERT, Circuit Judge.

This appeal requires us to decide whether Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 933, 934, fail to satisfy the standards of precision required by the due process clause, and, hence, are void for vagueness. The question arises in the context of an appeal from the denial of a petition for habeas corpus brought by appellant Levy when he was confined in the United States Penitentiary at Lewisburg, Pennsylvania, following conviction by a general court-martial.

Captain Howard B. Levy, an Army doctor on active duty at Fort Jackson, South Carolina, was charged with violating Articles 90, 133 and 134 of the Uniform Code of Military Justice. Article 90, 10 U.S.C. § 890, provides in pertinent part: "Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer: shall be punished . . . by such punishment other than death as the court-martial may direct." The specification under the Article 90 charge reads:

In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne)*, 8-R-F16, *Dermatology Training* did, at the United States Army Hospital, Fort

Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, willfully disobey the same.

Article 133, 10 U.S.C. § 933, states in pertinent part: "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

Article 134, 10 U.S.C. § 934, provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The charges under Articles 133 and 134 emanated from public statements made by Levy to enlisted personnel, of which the following is illustrative:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering

the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.¹

¹ Additional specifications under Articles 133 and 134 included:

ADDITIONAL CHARGE II: Violation of the Uniform Code of Military Justice, Article 133.

DA GGMO NO. 1

17 January 1969

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBienPhu'. I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there & would refuse to serve there if I were so assigned. . . ."

"The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional

mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. . . ."

"Is Communism worse than a U.S. oriented Government? . . . Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it. . . ."

"Geoffrey who are you fighting for? Do you know? Have you thought about it? Your real battle is back here in the U. S. but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your [sic] helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard the Viet Nameese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe—Bullshit? . . ."

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a VietNameese. At least the Viet Cong have that on their side. . . . Geoffrey these people may not be sophisticated (American Style) but their grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. . . .",

or words to that effect.

ADDITIONAL CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, dis-

Captain Levy was convicted of (1) wilful disobedience of the lawful command of his superior officer, (2) uttering public statements designed to promote disloyalty and disaffection among the troops, and (3) "wrongfully and dishonorably making in-

loyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing United States foreign policy as a "diabolical evil" designed more to protect selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and the United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor whites; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the Viet Nameese people at heart, in violation of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

temperate, defamatory, provoking contemptuous, disrespectful and disloyal statements" to enlisted personnel, the latter two offenses constituting "conduct unbecoming an officer and a gentleman," and "disorders and neglects to the prejudice of good order and discipline in the armed forces." 10 U.S.C. §§ 933, 934. He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor. Thereafter, Levy exhausted his appeals within the military.² Moreover, before, during and after the military proceedings he sought relief in the federal civilian courts.³ Finally, he filed a petition for habeas corpus alleging constitutional deprivations in the court-martial proceeding.

Preliminarily, we observe that although the court-martial found appellant guilty of charges and specifications under three articles, the court announced one general sentence for the combined charges. The general rule governing a single sentence imposed upon convictions on several charges is that the sentence will be upheld on appeal if any one of the con-

² *United States v. Levy*, C.M. 416, 463, 39 C.M.R. 672 (1968), petition for review denied, No. 21, 641, 18 U.S.C.M.A. 627 (1969).

³ *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir.), application for stay denied, 387 U.S. 915, cert. denied, 389 U.S. 960 (1967); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *Levy v. Resor*, Civ. No. 67-442 (D.S.C. July 5, 1967), aff'd per curiam, 384 F.2d 689 (4th Cir. 1967), cert. denied, 389 U.S. 1049 (1968); *Levy v. Dillon*, 286 F.Supp. 593 (D. Kan. 1968), aff'd, 415 F.2d 1263 (10th Cir. 1969).

victions is valid, and the sentence imposed is within the statutorily authorized maximum for the valid conviction, despite the fact that convictions on the other charges may not be valid. *Claasen v. United States*, 142 U.S. 140 (1891). This rule is applicable to federal habeas corpus review of a court-martial conviction and sentence. *Carter v. McClaughry*, 183 U.S. 365, 384-85 (1902); *Hunsaker v. Ridgely*, 85 F.Supp. 757 (D. Maine 1949). However, the rule is not jurisdictional in nature. Rather, its application is discretionary. *Benton v. Maryland*, 395 U.S. 784, 789-92 (1969); *Smith v. United States*, 335 F.2d 270, 272 n.2 (D.C. Cir. 1964). Indeed, in *Benton*, the Supreme Court recognized that application of the general sentence rule has been "somewhat haphazard," and this court has observed that *Benton* "put into doubt" the continuing validity of that rule. *United States v. McKenzie*, 414 F.2d 808, 811 (3rd Cir. 1969). In any case, the peculiarities associated with a sentence imposed by a military court render this case appropriate for discretionary refusal to apply the *Claasen* general sentence rule.*

* Our refusal to apply the general sentence rule is buttressed by a number of considerations unique to the prevailing system of military justice. The record reveals that the law officer instructed the military court not to consider in its determination of a sentence those charges which were dismissed, as this was tantamount to a finding of not guilty as to those charges. This instruction made it perfectly clear that the court should consider only those charges of which Levy was found guilty. It is natural to conclude that the court adhered to this instruction. Therefore, if one or more of the articles under which appellant was convicted and sen-

Because detention was mandated as a result of a general sentence under all three articles, it is impossible to isolate the sentence pronounced under a constitutionally valid provision from one announced under an invalid one. Therefore, we have the responsibility of inquiring whether one or more of these articles are defective.

I.

Initially, it is necessary to identify the limited contours of a civilian court's jurisdiction when presented with a habeas corpus petition from a federal prisoner whose incarceration was ordered by a court-martial. Our statement of this issue is deliberate, for we avoid the imprecise label "review." * Title 10 U.S.C. § 876 provides that military criminal pro-

tended were unconstitutional, *Claasen* itself indicates that the general sentence rule is inapplicable: "[I]n the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." 142 U.S. at 146-47. Any validity such a presumption possesses with respect to a civil court, where sentencing is pronounced by a judge skilled in the law, is diluted considerably in the military context, where the court-martial board, which returns the verdict and also pronounces sentence, is composed of non-judicial military officers.

Also militating against our application of the general sentence rule in this particular case is the fact that Articles 133 and 134 rarely stand alone as a basis for prosecution, but rather are usually joined with charges based upon other articles. Application of the general sentence rule virtually insulate these articles from constitutional scrutiny.

* See, e.g., "Civilian Court Review of Court Martial Adjudications," 69 COLUM. L. REV. 1259 (1969).

ceedings shall be "final and conclusive," and "binding upon all departments, courts, agencies, and officers of the United States." That is, as in the case of petitions for habeas corpus filed by state prisoners under 28 U.S.C. § 2254, where there is no jurisdiction to review the state *judgment*, here there can be no review of the final *judgment* of the court-martial. Naturally, however, a federal court has jurisdiction to examine state prisoner habeas corpus cases, and the basis of this jurisdiction was made clear in *Fay v. Noia*, 372 U.S. 391, 430-31 (1963): "The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot review the state court judgment; it can act only on the body of the petitioner. *Medley, Petitioner*, 134 U.S. 160, 173." Thus the federal court inquiry into "detention *simpliciter*" is not, jurisprudentially speaking, a review of the state judgment, but an inquiry into whether the constitutional rights of the prisoner were properly vindicated in the proceedings which caused his detention.

Accordingly, the Supreme Court has held that the rigid proscription of 10 U.S.C. § 876 erects no bar to a civilian court's habeas corpus jurisdiction in the case of a federal prisoner incarcerated under the sentence of a court-martial. *Gusik v. Schilder*, 340 U.S.

128 (1950).⁶ But unlike the extensive authority conferred in state prisoner habeas cases by *Fay v. Noia*, *supra*, and *Townsend v. Sain*, 372 U.S. 293 (1963), the contours of civilian court jurisdiction in court-martial cases still remain ill-defined. The most instructive treatment on this issue is the Supreme Court's decision in *Burns v. Wilson*, 346 U.S. 137 (1953), where the Court stated that the duty of a federal court to protect individual constitutional rights is not diminished merely because a judicial proceeding has been conducted by the military:⁷

In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are “final” and “binding” upon all courts. We have held before that this does not displace the civil courts’ jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U.S. 128 (1950). But these provisions do mean that when

⁶ The Court stated that the “finality clause” defined the terminal point in a case only within the military justice system, and that such a clause was never intended to act as a suspension of the writ.

⁷ Chief Justice Warren, speaking unofficially, described the opinion in *Burns* as constituting “a recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” Warren, “The Bill of Rights and the Military,” 37 N.Y.U.L.REV. 182, 188 (1962).

a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence. *Whelchel v. McDonald*, 340 U.S. 122 (1950).

346 U.S. at 142.

The government would have us interpret *Burns* to stand for the proposition that collateral review of military proceedings by federal civilian courts extends only to the traditional elements of jurisdiction, that is, whether the court-martial was properly constituted, possessed jurisdiction over the person and the offense, and had power to impose the sentence, but not to constitutional errors which would oust the military of jurisdiction. Furthermore, the government continues, even if this courts jurisdiction extends to an examination of constitutional errors, our review is complete upon a finding that the military court has considered appellant's constitutional claims, even if its conclusions are erroneous.

This interpretation reflects the view taken in *Ex Parte Reed*, 100 U.S. 13 (1879), where the Court held that the writ was limited to an inquiry into whether the court-martial had jurisdiction to try the matter and the power to impose sentence. Under such an approach, constitutional errors were deemed to oust the court of jurisdiction. However, this approach has been rejected in *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), and it is clear to this

court that the law has progressed a long way from *Reed*.^{*}

Undaunted, the government suggests that its position is vindicated by our decision in *United States ex rel. Thompson v. Parker*, 399 F.2d 774, 776 (3d Cir. 1968), *cert. denied*, 393 U.S. 1059 (1969): "Under the principle announced in *Burns*, therefore, the district court, after determining that the military courts had given due consideration to petitioner's contentions, quite correctly refused to review and reevaluate the facts surrounding petitioner's allegations." The government's reliance is misplaced for this argument overlooks the critical word "due" in the expression "due consideration." Indeed, any suggestion that *Thompson* imposes a standard of review different from that devised by *Burns*, ignores the language in *Thompson* immediately following that court's statement of the controlling rule: "'*Burns* is the law of the land.' And both this court and the district courts must abide by its teaching." 399 F.2d at 777. Thus, a fair reading of *Thompson* compels

^{*} Until the Court's decision in *Burns*, however, *Reed* did express the controlling law in this area. Only three years before *Burns*, in *Hiatt v. Brown*, 339 U.S. 103, 111 (1950), the Court stated: "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a courtmartial. . . . The single inquiry, the test, is jurisdiction.' In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision." See also *Whelchel v. McDonald*, 340 U.S. 122 (1950).

the conclusion that "due consideration" is but a paraphrase of the *Burns* requirement that the civilian court must be satisfied that the military courts have "dealt fully and fairly" with the allegations of constitutional deprivation.*

We are persuaded, therefore, that the district court had sufficient authority to meet the constitutional challenges to Articles 133 and 134 presented by appellant. Several reasons support this conclusion. First, if we accept the contention that a civilian court can only review the proceedings to determine whether the court-martial had "jurisdiction," recourse can be had to the Supreme Court's development of this concept when jurisdiction *vel non* was

* Admittedly, federal courts have experienced some difficulty in applying the "fully and fairly" test of *Burns*, and it has been observed that "fully and fairly" has "emerged as a facile phrase, easy to state, but difficult to define and to apply." "Civilian Court Review of Court Martial Adjudications," 69 COLUM. L. REV., *supra*, at 1262. Contrast, e.g., *Application of Stapley*, 246 F.Supp. 316, 320 (D. Utah 1965) ("[T]he vindication of constitutional rights. . . transcends ordinary limitations and affords federal courts both the jurisdiction and the duty to inquire and rule upon the legality of detainment of any person entitled to constitutional protection whether in or out of military service."), with *LeBallister v. Warden*, 347 F.Supp. 349, 352 (D.Kan. 1965) ("Sentences of courts-martial, affirmed by reviewing authority, may be reviewed 'only when void because of an absolute want of power, and are not merely voidable because of the defective exercise of power possessed.'"). See also Hart and Wechsler, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 2d ed., at 1537. See generally, Note, "Reconsideration of Scope of Review for Habeas Corpus from Military Courts, 11 DUQUESNE L. REV. 49 (1972).

the sole test in a state prisoner's habeas inquiry. *Ex Parte Siebold*, 100 U.S. 371 (1879), held that although the writ would issue only if the court that committed the prisoner lacked "jurisdiction" to do so, the state court did lack such jurisdiction if the statute creating the offense for which the prisoner was tried was unconstitutional.

Siebold saw a degree of expansion in *Moore v. Dempsey*, 261 U.S. 86 (1923), where, although the statute under which appellant was tried was constitutional, the trial court nevertheless lost jurisdiction where the proceedings, though formally proper, were held under the sway of mob rule. Therefore, a prisoner convicted and sentenced at a trial in which "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion," was entitled to federal habeas corpus relief. Much to the same effect was *Mooney v. Holohan*, 294 U.S. 103 (1935), where the Court granted the writ to an individual convicted in state court on the basis of testimony known by the prosecution to be perjured, thereby causing the court to lose jurisdiction.

The judicial fiction of loss of jurisdiction during the course of a proceeding was extended to the federal arena by the landmark decision of *Johnson v. Zerbst*, 304 U.S. 458 (1938). There, the Supreme Court found that the trial court "lost" jurisdiction as a result of its failure to provide counsel for the accused. Thus, the Court indicated that collateral review of substantial constitutional deprivations was within the purview of the writ. Finally, in a brief

per curiam opinion in *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942), the Court deserted this forced jurisdictional construction, holding:

[T]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. [Citing *Moore* and *Mooney*, *supra*.]

This departure by *Waley* is crucial because it announced that although there exists no defect in the court's jurisdiction, violations of constitutional rights are nevertheless within the scope of habeas review. The decision becomes significant in the present context because the same statute which vests federal courts with jurisdiction over civilian prisoners also provides for federal jurisdiction where the individual is confined by the military. 28 U.S.C. § 2241(c). Indeed, since the *Waley* decision, only in *Hiatt v. Brown*, 339 U.S. 103 (1950), has the Supreme Court indicated that the original view of *Siebold* and *Reed* controls, that is, when examining a petition for a writ of habeas corpus the reviewing court will conduct only the narrow inquiry into whether the court had jurisdiction:

The single inquiry, the test, is jurisdiction.' . . .
The correction of any errors [the court-martial]

may have committed is for the military authorities which are alone authorized to review its decision.

339 U.S. at 111.

Obviously, *Waley* and *Hiatt*, although emanating from the same note, struck divergent chords. Harmony, however, was forthcoming from *Burns*. Although *Burns* did not parallel the expanding scope of collateral review from civilian courts—noting that “in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civilian cases”¹⁰—the decision clearly

¹⁰ 346 U.S. at 139. The only support the Court could muster for this statement was *Hiatt* itself. Indeed, had the Court cited *Ex Parte Reed*, 100 U.S. 13 (1879), holding that the inquiry on habeas from a military proceeding is whether the court-martial had jurisdiction, for its statement that “in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases,” the fallacy of the proposition would have been exposed. *Reed* was decided during the same Term as *Siebold*. Yet, the scope of the inquiry devised in *Reed* for military habeas corpus, was at least as broad as *Siebold*’s inquiry in civil cases. To be sure, following the expanded view of habeas corpus from federal civilian courts taken by *Johnson v. Zerbst* and *Waley*, a number of circuits ruled that constitutional claims are cognizable on habeas corpus petitions from military prisoners. *Montalvo v. Hiatt*, 174 F.2d 645 (5th Cir.), cert. denied, 338 U.S. 874 (1949); *Benjamin v. Hunter*, 169 F.2d 512 (10th Cir. 1948); *United States ex rel. Weintraub v. Swenson*, 165 F.2d 756 (2d Cir. 1948); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944); *Schita v. King*, 133 F.2d 283 (8th Cir. 1943). Similarly, the bald statement in *Hiatt* that “[t]he single inquiry . . . is jurisdiction,” 339 U.S. at 111, failed to attract support from among the lower federal courts.

modified *Hiatt*. Indeed, the unswerving statement of *Hiatt* that military authorities "alone" are authorized to review any errors which may have occurred during a court-martial, was tempered in *Burns* to require a federal court to determine whether the "military decision has dealt fully and fairly" with the allegations of the petition. 346 U.S. at 142.¹¹ Only Justice Minton, in his concurring opinion, was willing to affirm dismissal of the petition on the basis of *Hiatt's* narrow jurisdictional test. Thus, this statement of the "fully and fairly" test in *Burns* represents the military analogue of the maturation of Siebold's "loss of jurisdiction" rationale. See *Moore*, *Mooney*, *Johnson*, and *Waley*, *supra*.

Moreover, we find much guidance in the specific language of *Burns* emphasizing "the fair determinations of the military tribunals," and the requirement that the court-martial "has dealt fully and fairly" with the constitutional allegations. Had the Supreme Court intended to deprive the district courts of jurisdiction

See, e.g., *Kuykendall v. Hunter*, 187 F.2d 545, 546 (10th Cir. 1951); *Burns v. Lovett*, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom. Burns v. Wilson*, 346 U.S. 137 (1953).

¹¹ Although the court has been virtually silent on this subject since its pronouncement in *Burns*, the Court has accelerated its expansion of the concept of federal habeas corpus from military courts at a much greater pace than its movement from *Siebold*. The same year the Court decided *Hiatt*, it indicated that a denial of the opportunity to raise the insanity defense at a court-martial would jeopardize the court-martial's jurisdiction. *Whelchel v. McDonald*, *supra*, 340 U.S. at 124.

where the constitutional issue was merely "fully" presented at court-martial, it would not have added "fair" and "fairly" to the test. Rather, the very premise of *Burns* is that servicemen as well as civilians are constitutionally protected from arbitrary or unlawful treatment.¹²

Another approach to federal habeas corpus review of military proceedings is characterized by the law-fact dichotomy articulated most precisely by the Court of Claims: issues of fact are not reviewable; issues of law are: In *Shaw v. United States*, 357 F.2d 949, 953-54 (Ct. Cl. 1966), after announcing a general rule that it would abstain from reviewing court-martial proceedings, the court stated "that such abstinence is not to be practiced where the serviceman presents pure issues of constitutional law, unentangled with an appraisal of a special set of facts. That type of unmixed legal question this court has always decided for itself." It is significant that this law-fact dichotomy comports with the admonition of *Burns* that it is "not open to a federal court to grant the

¹² Such a premise was recognized by this court in *United States ex rel. Innes v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944), where Judge Maris wrote:

We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be.

writ simply to reevaluate the evidence." 346 U.S. at 142. Moreover, *Burns* itself chose to treat the only "legal" issue raised by appellant there: whether the rule of *McNabb v. United States*, 318 U.S. 332 (1943), rendered his confession inadmissible. The plurality opinion stated that it did not because *McNabb* announced a rule of evidence for federal courts, and "its source is not due process of law." 346 U.S. at 145 n:12. Because appellant Levy's attack on Articles 133 and 134 is not dependent upon any evidentiary or factual construction, his argument represents the type contemplated by the traditional Court of Claims' approach.

We reject, therefore, the contention that full presentation of the constitutional issues to a court-martial precludes subsequent consideration of those issues by a civilian court. At the very least, where it is unnecessary to "reevaluate the evidence" adduced at the court-martial because the alleged infirmity is the facial unconstitutionality of the statute under which appellant was charged, a federal court has jurisdiction to inquire whether there existed an infirmity of constitutional dimension in the court-martial proceeding responsible for the detention of the petitioner.

II.

Articles 133 and 134¹³ were originally enacted by the Second Continental Congress on June 30, 1775. As enacted in the colonies, these articles derived from the British Articles of War, which, in turn, trace

¹³ See pp. 3-5, *supra*.

their ancestry from the Articles of war of James II, in 1688. After nearly three hundred years, the incredible similarity between the language of the present articles and their forebearers is astonishing. Article 64 of the Articles of War promulgated by James II, provided that "[a]ll other faults, misdemeanours and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial." Approximately eighty years later, the substance of this provision was incorporated into the British Articles of War of 1765, which were in effect at the beginning of the American Revolution. Article 3 of Section 20 of the British Articles read: "All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion." This article, which was altered ever so slightly by the Second Continental Congress, and enacted as Article 50 of the American Articles of War, remains virtually unchanged today.

More of the same is true for Article 133. Originally enacted by the Second Continental Congress as Article 47 of the American Articles of War, the text was identical to Article 23 of Section 15 of the British Articles: "Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is becoming the character of an officer and a gentleman, shall be discharged from the service." As the

United States Court of Military Appeals pointed out in *United States v. Howe*, 17 U.S.C.M.A. 165, 175-76 (1967), the scope of this provision was enlarged when the articles were reenacted in 1806, by omitting the original phrase "scandalous, infamous," and providing simply, "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." Since that time, this article, like Article 134, has remained unchanged.¹⁴

We now embark upon an examination of the constitutionality of these two articles, mindful of Justice Holmes' sage admonition,¹⁵ "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case of the Fourteenth Amendment to affect it."¹⁶

¹⁴ See generally, Winthrop, *MILITARY LAW AND PRECEDENTS*, 2d ed. (1920) at 920 (Articles of War of James II, 1688); at 929 (First British Mutiny Act, 1689); at 931 (British Articles of War of 1765), at 953 (American Articles of War of 1775); and at 976 (American Articles of War of 1806).

¹⁵ *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

¹⁶ Neither are we unmindful of this historical context in which these articles were enacted. The Court of Military Appeals in *United States v. Howe*, *supra*, 17 U.S.C.M.A. at 174, commented on the development of Article 88, bearing the same chronological features as the articles presently under review:

[This] was an offense in the British forces at the beginning of our Revolutionary War and was readopted by the Continental Congress. It is significant that it was reenacted by the First Congress of which fifteen of the thirty-nine signers of the Constitution were members, including James Madison, author of the Bill of Rights.

III.

Although Article 133 successfully withstood a constitutional attack predicated upon the First Amendment in *United States v. Howe*, 17 U.S.C.M.A. 165 (1967), we are aware of no decision of the Court of Military Appeals which dealt with that article on the precise issue lodged here: unconstitutionality because of vagueness.

Article 134, however, the government informs us, has twice been vindicated in bouts with the vagueness doctrine. *United States v. Frantz*, 2 U.S.C.M.A. 161 (1953); *United States v. Sadinsky*, 14 U.S.C.M.A. 563 (1964). In *Frantz*, the court virtually conceded "the conceivable presence of uncertainty in the first two clauses" of Article 134, but nevertheless experienced such ease in finding the article not void for vagueness that it could state: "[t]o put the question is to answer it in all reasonable minds." 2 U.S.C.M.A. at 163. Indeed, the court even assumed that civilian standards "are applicable in full force to the military community, "but reasoned that because the article has been part of our military law since 1775, it must be judged "not in vacuo, but in the context in which the years have placed it. *Musser v. Utah*, 333 U.S. 95, 97, 92 L ed 562, 565, 68 S Ct 397. That

It is of even more significance that this provision was readopted by the Ninth Congress in 1806, after the Bill of Rights had been adopted and became a part of the Constitution. This action of Congress constituted a contemporary construction of the Constitution and is entitled to the greatest respect.

the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicitly included in the Table of Maximum Punishments of the Manual. . . . "2 U.S.C.M.A. at 163. The court concluded that Article 134 was of "entirely defensible character," and that is established "a standard 'well enough known to enable those within . . . [its] reach to correctly apply [it].'" See *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Besides *Frantz*, the government would have us accept the constitutionality of Article 134 on the rationale of *United States v. Sadinsky*, *supra*. We decline to do so. Prescinding from the fact that *Sadinsky* did not entertain a challenge to the constitutionality of that article, the decision rests on *Frantz* and *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858), which we discuss, *infra*.

It is well settled that the statute [Article 134] is not void for vagueness. See *United States v. Frantz*, 2 USCMA 161, 7 CMR 37, and authorities therein collected. See also *Dynes v. Hoover*, 20 Howard 65 (U.S. 1858). *Nor does the defense counsel contend otherwise.* (Emphasis supplied.)

14 U.S.C.M.A. at 565.

Thus, it was on the authority of these decisions of the Court of Military Appeals that the district court sustained the constitutionality of these articles. Additionally, the government relies upon "a line of cases

dating from 1858 [in which] the Supreme Court has recognized that the . . . Articles . . . are not too vague and are not unconstitutional. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Carter v. McClaghry*, 183 U.S. 365 (1902); *Grafton v. United States*, 206 U.S. 333 (1907); see also *Ex Parte Mason*, 105 U.S. 696, 698 (1882).” Because these cases form the basis of the government’s argument before this court, we examine them *seriatim*.

IV.

In *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858), a seaman sought habeas relief after being convicted by a court-martial of attempting to desert. Petitioner contended that there existed no specific military offense of “attempting to desert,” and that the court-martial was, therefore, without jurisdiction to try him. The Court rejected this argument, stating that “when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article,¹⁷ of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offences by the usages in the navy of all nations. . . .” 61 U.S. (20 How.) at

¹⁷ Article 32, the naval counterpart of the present Article 134, read: “All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.”

82. The Court went on to indicate that such a provision was not subject to abuse despite its "apparent indeterminateness," because it "is well known by practical men in the navy and army, and by those who have studied the law of courts martial," precisely what such crimes are and how they may be punished. *Id.* It must be conceded, therefore, that Article 134 weathered the challenge of vagueness in the Supreme Court in 1858 for substantially the same reasons adopted by the Court of Military Appeals in 1953 in *Frantz*.

The parade of cases following *Dynes* approving these "general articles" commenced with the Supreme Court's decision in *Smith v. Whitney*, 116 U.S. 167 (1886). There the Court dealt with a Navy provision manager and paymaster who falsified and illegally extended various government contracts, "to the great scandal and disgrace of the service, and the injury of the United States." Specifically, the Court held that it was not prepared to "declare that an officer of the navy, who, while serving by appointment of the President as chief of a bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, cannot lawfully be tried by a court martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals, and to the dishonor of the naval service." 166 U.S. at 186. There, the Court upheld the validity of

Articles 8 and 22 of the "Articles for the Government of the Navy." Article 8 provided:

Such punishment as a court martial may adjudge may be inflicted on any person in the Navy—

First. Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals.

Article 22, which was Article 32 in *Dynes*, provided that all offenses committed by Navy personnel, "which are not specified in the foregoing articles, shall be punished as a court martial may direct." This latter article had been interpreted to mean that "when the offense is a disorder or neglect not specifically provided for, it should be charged as 'scandalous conduct tending to the destruction of good morals.'" Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy, § 126 (1870). The Court approved the right of the military to so charge, analogizing that the case was similar to "conduct unbecoming an officer and a gentleman," which the Court, in dicta, likewise considered permissible. Unfortunately, however, the opinion contains no searching analysis of such an article's possibility for overbreadth, and, generally speaking, does not constitute a persuasive offering.

United States v. Fletcher, 148 U.S. 84 (1893), decided only seven years after *Whitney*, involved the court-martial of a retired Army captain under Article 83: "Any commissioned officer convicted be-

fore a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." Specifically, this charge resulted from Captain Fletcher's incurring and non-payment of certain indebtedness. Before the Supreme Court, appellant argued that the court-martial was without jurisdiction because "the charge and specifications stated no offence whatever 'within any Rules and Articles of War, or known to the military law and custom of the United States.'" In what can only be characterized as an incredibly conclusory manner, the Court brushed aside this contention, noting only that it could not say "[t]he specifications were . . . incapable of sustaining the charge." 148 U.S. at 192. Like *Whitney*, therefore, Fletcher's insight into the validity of these articles hardly rises to the stature of unshakable constitutional dogma.

Predictably, however, subsequent decisions found little difficulty in sanctifying the confusing and conclusory treatment offered by *Whitney* and *Fletcher*. When it was suggested to the Court in *Swaim v. United States*, 165 U.S. 553 (1897), that a charge of conduct unbecoming an officer and a gentleman failed to set forth an offense of the facts of that case, the Court merely cited to both *Whitney* and *Fletcher*, and added: "If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war." 165 U.S. at 561.

There was no contention that the general articles were too vague to support a conviction in *Carter v. McClaghry*, *supra*, but rather that charged violations under those articles were contained in previous charges. The opinion of Chief Justice Fuller, therefore, is not illuminating on the issue before us. Nevertheless, the Court found it opportune to refer to *Swaim*, *Whitney* and *Fletcher*, *supra*, as general support for these articles.¹⁸

V.

That, then, is the picture. The predominant judicial supports for the proposition that the "general articles" are not void for vagueness consist of *Frantz*, *supra*, from the Court of Military Appeals, and *Dyne*, *supra*, from the Supreme Court. Notwithstanding these precedents, such as they are, we are persuaded that we are not precluded from reexamining the constitutional question of due process.

Initially, we recognize that before us for interpretation is a relatively new Uniform Code of Military Justice, effective January 1, 1957, 10 U.S.C. § 801 et seq. Although, as heretofore observed, the general articles today are basically the same as their historical precedents, they must be construed in conjunction with a comprehensive Military Justice Code of which they are now a component. This code concededly extends to military defendants a broad spectrum of

¹⁸ *Grafton v. United States*, 206 U.S. 333 (1907), is wholly inapplicable to our inquiry, it being an appeal by an army private from a conviction by a civil court, after a court-martial determined he had not violated one of the articles.

court-martial rights theretofore unaccorded. For example, the new code requires the President to prescribe court-martial procedures which "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

We are also conscious of Justice Brennan's observation in *Furman v. Georgia*, 408 U.S. 238 (1972), that "[o]bviously, concepts of justice change," (concurring opinion at 304), and that, at least insofar as capital punishment is concerned, "the cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today. . . . *stare decisis* [should] bow to changing values." (Marshall, J., concurring opinion at 329-30.)

An even more impressive suggestion for the reconsideration of these articles is the specific reference to Article 134 in *O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1968), where the Court itself expressed doubts as to the constitutionality of that article:

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted, punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

Does this satisfy the standards of vagueness as developed by the civil courts?

Such a statement of the issue compels the conclusion that the Supreme Court has invited the federal courts to reexamine this due process question in the context of current constitutional teachings. We turn now to a consideration of those principles.¹⁹

A.

Initially, we encounter extreme difficulty in reconciling the Court of Military Appeals' "settled and understandable content of meaning" of Article 134, and its "no less than forty-seven different offenses cognizable thereunder,"²⁰ with the principle that a lack of fair warning in a criminal statute of what conduct is prohibited offends due process. Our examination begins with the basic concept that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of

¹⁹ See also the statement of Justice Douglas in *Levy v. Parker*, 396 U.S. 1204, 1205 (1969), granting appellant Levy's application for bail:

In *O'Callahan v. Parker*, 395 U.S. 258, which the lower courts did not have before them when they denied bail, we reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Apart from the question of vagueness is the question of First Amendment rights.

²⁰ *United States v. Frantz*, *supra*, 2 U.S.C.M.A. at 163. (Emphasis supplied.)

law. . . . [T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." In each such case "a standard of some sort was afforded." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1927); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

The most recent articulation of the vagueness doctrine, representing a synthesis of past teachings, is found in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for res-

olution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Citations omitted.)²¹

Failing to pass constitutional muster have been statutes penalizing "misconduct," *Giaccio v. Pennsylvania*, 382 U.S. 399 (1969); conduct that was "annoying," *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); "reprehensible," *Giaccio v. Pennsylvania*, *supra*; and "prejudicial to the best interest" of a city, *Gelling v. Texas*, 343 U.S. 960 (1952). Other federal courts have voided prohibitions of conduct that "reflects discredit," *Flynn v. Giarruso*, 321 F.Supp. 1295 (E.D. La. 1971); or is "offensive," *Oestreich v. Hale*, 321 F. Supp. 445 (E.D.Wis. 1970).

²¹ See also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 152 (1971): "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States v. Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242.

"Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.' *Lanzetta v. New Jersey*, 306 U.S. 451, 453."

For our purposes then, the following questions must be answered: Do Articles 133 and 134 give to a commissioned officer of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute? Do these articles encourage erratic arrests and convictions?

Article 133 fails to explain what conduct "unbecomes" an officer or a gentleman. *The Officer's Guide* offers little assistance in this direction for it merely advises that "[a]n officer is expected to be a gentleman and a gentleman has been defined as a man who is never intentionally rude."²² Winthrop, in his classic treatise, *Military Law and Precedents*, defined "unbecoming" as "morally unbecoming and unworthy," and described a gentleman as a "man of honor . . . of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment."²³ Thus, included within the scope of proscribed conduct under Article 133 is official conduct that "in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character as a gentleman;" or private conduct that "in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms."²⁴

²² D. Reynolds, *THE OFFICER'S GUIDE*, 45 (1969).

²³ W. Winthrop, *MILITARY LAW AND PRECEDENTS*, 711 (2d ed. 1920).

²⁴ *Id.* at 713. See generally Note, "Taps for the Real Catch-22," 81 *YALE L.J.* 1518, 1522-23 (1972). This identical

Thus, we are far from satisfied that the amorphous phrase, "a gentleman," replete with its capacity for subjective interpretation as set forth in the *Manual for Courts-Martial*, note 24, *supra*, can even remotely be said to employ "words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." *Connally v. General Construction Co.*, *supra*, 269 U.S. at 391.

language, written in 1886, is repeated in the 1968 MANUAL FOR COURTS-MARTIAL, which sets forth the following advice:

212. ARTICLE 133—CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN

Discussion. The conduct contemplated may be that of a commissioned officer of either sex or of a cadet or midshipman. When applied to a female officer the term "gentleman" is the equivalent of "gentlewoman."

Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman. This article contemplates conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

Article 134 deserves the same criticism. The *Manual*, relied upon by the court in *Frantz*, was the subject of extensive reference in the dissenting opinion of Chief Judge Bazelon in *Levy v. Corcoran*, 389 F.2d 929, 932 (D.C. Cir. 1967); "A simple reading of the Articles shows that they are quite broad. Indeed, the Manual for Courts-Martial interprets Article 134 to include more than fifty different offenses ranging from abusing public animals to wearing an unauthorized insignia."²⁵

Indeed, the history of prosecutions under this article shows that it has served as an unwritten criminal code, a catchall receptacle designed as a statutory basis for prosecutions that run the gamut from impersonating an officer and possession of drugs, to failure to pay debts, gambling with a subordinate, and straggling. Thus, "disorders and neglects to the prejudice of good order and discipline in the armed forces" has provided the statutory authority for prosecutions for drunkenness, appearing in improper uniform, abuse of military vehicles, and possession of marihuana.

"Conduct of a nature to bring discredit upon the armed forces" has been interpreted to include any violation of local civil law, adultery, bigamy, fleeing from the scene of an accident, and dishonorable failure to pay debts.

"Crimes and offenses not capital" is a veritable criminal code of its own. This cryptic phrase is the statutory justification for "those acts or omissions,

²⁵ See Appendix.

not made punishable by another article, which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.”²⁶ This includes various assaults, indecent acts with a child under the age of 16 years, false swearing, disloyal statement undermining discipline and loyalty, misprison of a felony, dishonorable failure to pay debts, dishonorable failure to maintain funds for payment of checks, bigamy, communicating a threat, use of false and unauthorized passes, permits, discharge certificates, and identification cards, negligent homicide, offense against correctional custody, and receiving stolen property.²⁷

Indeed, the reasoning in *United States v. Frantz*, *supra*, would be more persuasive if the *Manual for Courts-Martial*, or some other official guide, outlined with exactitude and limitation that conduct proscribed by Article 134. Under such circumstances it might be successfully contended that as part of his military training before embarking upon active duty in the field, a commissioned officer could familiarize himself with the level of behavior required. We might then agree “[t]hat the clauses under scrutiny have acquired the core of a settled and understandable content of meaning.” *Frantz*, *supra*, 2 U.S.C.M.A. at 163. But Article 134 is open ended. The *Manual for Courts-Martial* does not purport to list all the offenses cognizable under the article. Thus, the

²⁶ MANUAL FOR COURTS-MARTIAL, ¶ 213e (1968).

²⁷ MANUAL FOR COURTS-MARTIAL, *supra*, at ¶ 213f.

Frantz court, in 1953, noted the existence of "no less than forty-seven different offenses" triable under the article. By 1967, the Court of Appeals for the District of Columbia in *Levy v. Corcoran*, *supra*, could extend this count to fifty-eight. 389 F.2d at 933-34. The 1968 Edition of the *Manual* lists sixty-three illustrative offenses. (*Manual*, *supra*, at Appendix 6, ¶¶ 126-188.) It becomes readily apparent, therefore, that at best the *Manual* includes but a compilation of those offenses previously determined by various courts-martial to come within the breadth of Article 134. Moreover, such new specifications, detailing conduct that will henceforth be considered criminal, does not cure this defect of overbreadth. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, *supra*, at 453.

Several additional observations are prompted by this analysis. There is no one unifying theme to the offenses prohibited by Article 134. Instead, there is a commingling of the military counterpart of civilian offenses against the person, offenses against public morals, and offenses against property. Added to this is a conglomeration of purely military offenses relat-

ing to the wearing of a proper uniform and insignia, the carrying of firearms, and the propriety of various relationships with subordinates.

The comprehensive sweep of this article, illustrated by the variegated examples contained in the *Manual*, runs on collision course with the proscription of *United States v. Reese*, 92 U.S. 214, 221 (1876): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The National Commission on Reform of Federal Criminal Laws, established by Congress, Public Law 89-801, asserted as its cardinal principle the fundament of American law "that no person can be criminally punished except by judicial process and unless the acts for which he is punished were clearly forbidden prior to the time he committed them."²⁸ Nor is this "principle of legality" an American monopoly. The French Penal Code, for example, contains the following preamble: "No violation, no misdemeanor, no felony can be punished by punishments not provided by law prior to their commission."²⁹

²⁸ Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, at 6 (1970). The basis of this principle is that it violates due process to punish a person for violation of penal laws which are vaguely worded. See, e.g., Article I, Section 9 of the Constitution: "No Bill of Attainder or ex post facto law shall be passed."

²⁹ "Repudiation of such fundamental principles of law has been a hall-mark of 20th century totalitarian regimes. Crim-

Facially, and on the basis of the historical interpretation of Article 134 set forth in the *Manual for Courts-Martial*, the boundless, open-ended, all-encompassing quality of this article runs counter to the basic philosophy of criminal codes of all modern nations. "The codification of definite rules in the law of crimes is considered by many in Western democratic societies as a fundamental requirement of liberal democracy. 'They take their stand on the principle that no one shall be punished for anything that is not expressly forbidden by law. *Nullum crimen, nulla poena, sine lege*. They regard that principle as their great charter of liberty.' A. DENNING,

inal Codes of the various Soviet Socialist Republics originally provided:

If a socially dangerous act is not directly specified in the Code, the basis and limits of punishment for it shall be determined by applying the sections of the Code which specify crimes of a kind closely resembling the act.

"Technically called the 'application of penal clauses by analogy,' the same kind of criminal provision was found in Nazi Germany. See GSOVSKI, REFORM OF CRIMINAL LAW IN THE SOVIET UNION (Library of Congress 1960) and GSOVSKI, THE STATUTORY CRIMINAL LAW OF GERMANY (Library of Congress 1947).

"Under these schemes of law, one's present acts were always subject to the possibility that they might later be declared antisocial. There were no reasonable guides to social conduct. One lived among his countrymen in constant terror. 'Comrad Ivanov . . . was shot last night, in execution of an administrative decision.' KOESTLER, DARKNESS AT NOON 162 (1941). That was all one needed to know about the law." Working Papers, *supra*, note 28, at 7.

FREEDOM UNDER LAW 41 (1949)."³⁰ In testifying before the Committee on the Judiciary of the United States Senate, Professor Gerhard Mueller, Director of the Criminal Law Education Research Center of New York University, made clear that an examination of all current European codes disclosed that each criminal code contains a "Special Part," describing specific offenses, as well as a "General Part" containing provisions applicable to all substantive offenses.³¹ He emphasized: "It has been fundamental throughout this history of Anglo-American Criminal Law, as well as Continental Criminal Law, that criminal liability is imposed on persons who commit a wrongful act knowing that they are doing something wrongful, in other words, acting with 'an awareness of wrongfulness.'"³²

We have previously asked whether Articles 133 and 134 give to a commissioned officer of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and whether these articles encourage erratic arrests and convictions. The foregoing analysis now raises a new series of questions.

What explicit standard of conduct is announced by a statute which punishes an individual for behaving

³⁰ Bishin & Stone, LAW, LANGUAGE AND ETHICS, at 432 (1972).

³¹ Reform of the Federal Criminal Laws, Part III, Subpart C at 1838. Hearings before Subcomm. on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Ninety-Second Cong., 2d Sess., Part III, Subpart C, at 1838 (1972).

³² *Id.*, at 1840.

other than as an officer and a gentleman? In a society witnessing rapidly changing manners and mores, against what existing standard is gentlemanly conduct to be measured?

More of the same must be said for Article 134. What specific standard determines what constitutes a disorder or neglect? Can these terms be limited or defined within the seemingly boundless context of Article 134? Even assuming that a meaningful, twentieth-century definition of those terms can be concretized, at what point does such conduct rise to the level at which it prejudices good order and discipline in the armed forces?

Under these circumstances, how can we possibly conclude that these articles give individual officers of ordinary intelligence a reasonable opportunity to know what is prohibited? Unlike the Court in *Grayned v. City of Rockford*, *supra*, we are unable to find that "it is clear what the [articles] as a whole prohibit." 408 U.S. at 110.

B.

What has already been said is sufficient, in our view, to hold that the General Articles do not pass constitutional muster as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians. Without the necessity of a protracted discussion, we conclude that these articles also have the very real capacity for arbitrary and discriminatory enforcement. To reiterate the language of *Grayned*: "[I]f arbitrary and discriminatory enforcement is to be prevented, laws

must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford, supra*, 408 U.S. at 108-09. "Such vagueness . . . also . . . compels enforcement officers, as well, to guess at what violates the law, thus either setting the stage for arbitrary police action, or if police and prosecutors evolve their own rational standards of enforcement, constituting an inappropriate delegation of criminal lawmaking authority." *Scott v. District Attorney*, 309 F.Supp. 833, 836 (E.D. La. 1970).³³

Transposed to a military setting, the dangers of arbitrary and discriminatory action assume more drastic proportions. The commanding officer may have the option of non-judicial punishment, Article 15, 10 U.S.C. § 815, and named commanding officers have the power to convene general courts-martial, Article 22, 10 U.S.C. § 822, special courts-martial, Article 23, 10 U.S.C. § 823, and summary courts-martial, Article 24, 10 U.S.C. § 824. Moreover, the convening authority has the authority to appoint the members of the court, Article 25, 10 U.S.C. § 825.

Our conclusion that Articles 133 and 134 fail to set forth satisfactory standards of conduct leads to

³³ "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania, supra*, 382 U.S. at 402-03.

the inescapable corollary that enforcement of these articles is to varying degrees arbitrary and discriminatory. Because Article 133 fails to define "conduct unbecoming an officer and a gentleman," are diverse boards of military officers to determine what conduct "becomes" a gentleman? Thus, might what "becomes" an officer in Tokyo, be considered "rude" in Sante Fe, or "unbecoming" at Fort Jackson, South Carolina? Are federal courts to be the arbiters of gentlemanly behavior? Similarly, Article 134 fails to announce any standard by which to determine when conduct becomes "prejudicial to good order and discipline." Who is to determine what conduct is "prejudicial?"

Moreover, if we, following an exhaustive search, cannot uncover rational standards by which to judge alleged violations of these articles, how can a commanding officer or court-martial board, with little or no legal training, conceivably legally evaluate alleged transgressions of Articles 133 and 134? Arbitrary and discriminatory enforcement of such vague laws is *a fortiori*.

C.

Finally, the general articles have the capacity of abutting sensitive areas of basic First Amendment freedoms. Those statutes which regulate conduct touching the borders of this amendment are required to be more specific than others. "It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely

drawn statute. At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution.' *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrates that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' *id.*, at 486; see also *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964); *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); *id.*, at 619-620 (White, J., dissenting); *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *NAACP v. Button*, 371 U.S. 415, 433 (1963). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972).

Thus, whatever merit there may be in the government's contention that over two hundred years of military operation under these articles have given meaning and certainty to their terms when applied to such ordinary anti-social conduct as indecent assault, the argument becomes unpersuasive where the proscribed conduct is speech arguably protected by the First Amendment.

Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense

under Article 134, "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With the possible exception of the statement that "Special Forces personnel are liars and thieves and killers of peasants and murders of women and children," it would appear that each statement for which appellant was court-martialed could fall within the example given in the *Manual*. However, even if this statement in the *Manual* can be construed as providing a sufficient warning against the conduct of the individual in the case before us, the article nevertheless can be adjudicated void for vagueness if it would be susceptible to future use against conduct not warned against in sufficient detail. As the Court stated in *Coates v. City of Cincinnati*, *supra*, 402 U.S. at 616: "We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech."

Although the Supreme Court may have at one time adhered to the doctrine that an individual may not assert the vagueness of a statute unless it is vague as to him, *see, e.g., Williams v. United States*, 341 U.S. 97 (1951), that doctrine is no longer in vogue. An individual is now permitted standing to attack and overbroad statute infringing on First Amend-

ment rights even where it may be sufficiently definite as to him and where his own activity may not be protected by the Constitution. *Gooding v. Wilson*, *supra*. As the Supreme Court pointed out in the *Gooding* case, the modern rule is justified by the need to guard against the possible "chilling effect" of an overbroad statute. *Id.*, at 521.

Thus, the principle enunciated in *Gooding* confers standing upon Captain Levy. There is great danger that Articles 133 and 134 will chill protected speech. Moreover, the rule against relying on the constitutional rights of others, *see, e.g., Yazoo v. Jackson*, 226 U.S. 217 (1912), is discretionary and should not be invoked where it would be difficult for those constitutionally deprived to assert their rights. *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953).

In the instant case, just as the lack of statutorily defined standards led to the conclusion that enforcement of the articles is arbitrary and discriminatory, so too is the conclusion inescapable that such vague articles have an impermissible chilling effect on First Amendment freedoms.

We conclude that measured against existing constitutional standards applicable to civilian statutes and ordinances, Articles 133 and 134 are void for vagueness.

This does not terminate our inquiry, however, for we are now required to decide whether affirmative countervailing circumstances inhere in the armed forces which justify the existence of statutes which would not otherwise pass constitutional muster.

VI.

We acknowledge that "[m]ilitary law; like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, *supra*, 346 U.S. at 140. Thus, in sustaining the constitutionality of Article 134 against the charge of vagueness, the Court of Military Appeals in *Frantz* referred to the "*presence of special and highly relevant considerations growing out of the essential disciplinary demands of the military service. These are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development.*" 2 U.S.C.M.A. at 163-64. (Emphasis supplied.) This naked, conclusory statement constitutes a brazen slap at a system whose banner is the protection of individual liberties, and, as such, it has for too long withstood inquiry compelling precise delineation of these "special and highly relevant considerations."

It has been suggested that three "special and highly relevant considerations" unique to military life might exist:³⁴ (1) maintaining high standards of conduct in the armed forces; (2) ease of conviction in a court-martial; and (3) justifying punishment for servicemen who commit unforeseen crimes.

The Supreme Court has held that "[i]t is no answer to the constitutional claim [of vagueness and

³⁴ Note, "Taps for the Real Catch-22," 81 YALE L.J., *supra*, at 1534.

overbreadth] to say . . . that the purpose of these regulations was merely to insure high professional standards and not curtail free expression." *NAACP v. Button, supra*, 371 U.S. at 438-39. Moreover, what high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one's duty, and secondly, executing it? And, in this regard, would not an even higher standard be served by delineation of the various offenses under Article 134, followed by obedience to these standards?

Whatever efficacy there may have been to the ease-of-conviction argument in another era, and we do not assume that it ever was persuasive, the passage and implementation of the Uniform Code of Military Justice clearly demonstrates a Congressional mandate that the maximum of constitutional procedural safeguards now be afforded servicemen. A consideration based on ease-of-conviction is now totally bereft of explicit support and does not deserve the dignity of extended discussion.

The third consideration would suggest the desirability of allowing the military freedom to develop a counterpart of common law crimes; to provide statutory authority for the development of new standards of conduct and the imposition of criminal penalties for the violation thereof. Such a notion contravenes our federal tradition. There is no federal common law of crimes today and there never has

been,³⁵ and this principle extends to the military. Whatever has been the tradition of certain states, the enunciation of federal crimes and offenses has always been by statute. Even more fundamental, however, is the "general principle of legality" discussed heretofore, wherein we emphasized the dubious constitutionality of imposing criminal sanctions upon conduct previously not explicitly prohibited by law.

Moreover, the Task Force on the Administration of Military Justice in the Armed Forces, in reporting to the Secretary of Defense on November 30, 1972, has flatly denounced the historical basis for Article 134: "The historical reason for having a general article—to try civilian offenses—is no longer valid, as the Uniform Code of Military Justice includes clearly defined civilian-type offenses in its punitive articles. Additionally, concern has been expressed in some quarters that the vagueness and breadth of language in this article makes it overly subject to abuse." Vol. 1, p. 96.

Finally, we observe that there exists no military necessity whatsoever for Articles 133 and 134. Punitive Articles 77 through 132, 10 U.S.C. §§ 877-932, outline substantive offenses with the specificity characteristic of a civilian criminal code. We perceive no justification in not doing likewise for those offenses presently subsumed into Articles 133 and 134.

³⁵ "Common law crimes, especially those formulated in vague terms, are considered serious threats to liberty." See A. Denning, *FREEDOM UNDER LAW*, *supra*, at 41-42; H.L.A. Hart, *LAW LIBERTY AND MORALITY*, 12 (1963).

We conclude that there exist no countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values.

We therefore conclude that Articles 133 and 134 fail to satisfy the standard of precision required by the due process clause and, hence, are void for vagueness.³⁶ However, in so holding, we also hold that application of this decision shall be prospective only except as to those cases where (1) the issue was raised and preserved and (2) was pending in the military judicial system or pending in the federal court system on this date.³⁷

VII.

Having concluded that the charges against Captain Levy under Articles 133 and 134 were unconstitutional, there remains for our consideration the charges brought against appellant under Article 90. Pursuant to this article, appellant was convicted of

³⁶ Shortly before this opinion was filed, the Court of Appeals for the District of Columbia, per Justice Clark, in *Avrech v. Secretary of the Navy*, — F.2d — (41 U.S. L.W. 2497, D.C. Cir. March 20, 1973), held Article 134 void for vagueness.

³⁷ See *United States v. Zirpolo*, 450 F.2d 424, 432-33 (3d Cir. 1971), where we observed that generally, "rulings not primarily designed to enhance the reliability of the fact-finding or truth-determining process have not been applied retroactively." See also *United States v. Desist*, 394 U.S. 244, 249 (1969), especially criteria (b) and (c).

wilful disobedience of the lawful order of Colonel Henry F. Fancy, a physician who was commanding officer of the United States Army Hospital, Fort Jackson, South Carolina. Appellant refused to obey Colonel Fancy's written and oral order to establish and operate a dermatological training program for Special Forces aidmen. During his court-martial, as well as in his various military and civilian appeals, appellant sought to justify his refusal to obey this direct order on the same two grounds urged on this appeal.

First, Levy asserted that to train Special Forces aidmen in dermatology was inconsistent with his concept of medical ethics and violative of the Hippocratic oath because this type of aidman was committing war crimes in Vietnam. Consequently, Levy's act of training these men, he contended, would have constituted participation in a war crime.

Refusing to obey an order to commit a war crime is a recognized defense under the Uniform Code of Military Justice to an Article 90 charge. During the trial, the law officer conducted a hearing outside the presence of the members of the court-martial to accept an offer of proof by appellant as to the issue of whether war crimes were being committed in Vietnam and, more specifically, as to whether Special Forces troops as a mode of operation committed war crimes in Vietnam. Upon completion of the hearing, the law officer ruled that although there perhaps occurred instances of needless brutality in the Vietnam War, nevertheless, there was "no evidence that would render this order to train aidmen illegal on the

grounds that eventually these men would become engaged in war crimes or in some other way prostitute their medical training by employing it in crimes against humanity."

At best, appellant could establish that individual American personnel may have violated the law of war in Vietnam. However, there never was any showing that the medical training appellant was ordered to give had any connection whatsoever with the perpetration of any war crime. Thus, appellant failed to demonstrate how the existence of war crimes committed by individuals other than those he was ordered to train was relevant to his failure to obey the order. Particularly relevant in this is that he failed to show that Special Forces aidmen as a group engaged systematically in the commission of war crimes by prostituting their medical training.

The second and principal thrust of appellant's challenge concerns the lawfulness of the order based upon improper motivation of the superior officer giving the order; this likewise is a recognized defense under the Uniform Code of Military Justice to an Article 90 charge. Appellant contends that Colonel Fancy gave the order knowing it would be disobeyed and that the sole purpose of giving this direct order was to increase the possible punishment which could be imposed on appellant. At trial, the Government introduced significant evidence in its attempt to prove the lawfulness of the order, and defense counsel conducted considerable cross-examination on this point in its attempt to prove the bad motivation behind the order,

which would render it unlawful. In his instructions, the law officer instructed the court-martial that they would have to find beyond a reasonable doubt that the order was not given for the sole purpose of increasing punishment for an offense appellant was expected to commit. See, e.g., *United States v. Carson*, 15 U.S.C.M.A. 407 (1965). Implicit in the court's guilty verdict returned on this charge was a conclusion that the order was not given for the proscribed purpose.

In isolation, these factual determinations adverse to appellant under an admittedly valid article are not of constitutional significance and resultantly, are beyond our scope of review. See, *Whelchel v. McDonald*, 340 U.S. 122 (1950). However, there remains the necessity for determining whether the conviction under the valid Article 90 charge suffered from any constitutional infirmity by reason of its joinder at trial with the charges under Articles 133 and 134, now found to be unconstitutional.

VIII.

We conclude that, under the circumstances here present, joint consideration of the charges under Article 90 with charges under Articles 133 and 134 requires a finding that appellant's right to a fair trial was prejudiced. Because most of the evidence introduced on the charges under Articles 133 and 134 would have been inadmissible under the Article 90 charge, and especially in light of the inflammatory

and controversial nature of this evidence, we are persuaded that its consideration was error.

In examining the possibility of inherent constitutional infirmities in a second degree murder conviction returned in a state prosecution in which the defendant had been unconstitutionally charged with first degree murder (barred because of double jeopardy), the Second Circuit held that the "question is not whether the accused was actually prejudiced, but whether there is a *reasonable possibility* that he was prejudiced." *United States ex rel. Hitenyi v. Wilkins*, 348 F.2d 844, 864 (2d Cir. 1965), *cert. denied sub nom. Mancusi v. Hitenyi*, 383 U.S. 913 (1966). Although the danger that the jury compromised on a lesser charge, as existed in *Wilkins*, was not present in Captain Levy's court-martial, compromise on a lesser charge is but one way in which a defendant can be prejudiced. Speaking for the court, Judge, now Justice, Marshall said:

There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available. 348 F.2d at 864.

The Supreme Court demands no standard of review less strict nor stringent. *Kotteakos v. United States*, 328 U.S. 750 (1946), dealt with the harmless

error statute, 28 U.S.C. § 392, and did not confront an error of constitutional significance as present in this case. Therefore, a showing of a lesser degree of prejudice may be presented by the appellant here than in *Kotteakos*, or, conversely, as it is typically stated, the prosecution must demonstrate that the error was harmless beyond a reasonable doubt. Nevertheless, *Kotteakos* did hold that neither a clear showing in the record of the accused's guilt, nor findings of not guilty as to some defendants which indicated that the jury did discriminate among the charges, was sufficient to overcome the prejudice to the defendants from an overly broad charge. 328 U.S. at 767.

We find, with some facility, that Levy was prejudiced by the admission of evidence on the Articles 133 and 134 charges; in any event, there undoubtedly existed a reasonable possibility that he was prejudiced. A number of factors support this conclusion.

First, it is not the role of this court to weigh the evidence to determine whether Levy was or was not guilty of the Article 90 charge. Our sole responsibility is to decide whether there exists a reasonable possibility that the court-martial's finding of guilt on the Article 90 charge was influenced by evidence admitted on the Articles 133 and 134 charges. The question of the legality of the Article 90 order was contested at trial. We cannot be certain whether the court-martial's resolution of that question was affected by evidence of Levy's anti-war sentiments.

Second, the court-martial found under the Articles 133 and 134 charges that Levy did not write the letter to Sergeant Hancock, *supra*, at 5-6, "with in-

tent to interfere with . . . loyalty, morale" etc., although he did write it with "culpable negligence" as to its impact. Such a finding indicates the jury did follow the judge's instructions on lesser included offenses. Nevertheless, it does not reasonably follow from this that the jury separated its consideration of the Article 90 charge from the evidence introduced in connection with the other charges. *Kotteakos, supra.*

Third, it is true that many of Levy's political views were elicited by the defense in its cross-examination of Colonel Fancy. This trial strategy was designed to demonstrate an illegal motive on Fancy's part. It is by no means clear, however, that Levy's political views would have been emphasized in the absence of the Articles 133 and 134 charges. Indeed, Levy's attorneys believed he would be prejudiced by a joint trial of all charges. They moved for a severance. Had the severance been granted it is quite possible the defense would have relied only on the claims that the order commanded Levy to commit a war crime (tried out of the hearing of the jury), and that compliance with the order would have violated medical ethics. We do not know how the court-martial would have progressed, nor can we speculate how the defense would have been conducted.

In sum, we can only speculate what would have happened at Captain Levy's court-martial had he been charged only with a violation of Article 90. Under such circumstances, we cannot reach the legal conclusion that Captain Levy was not prejudiced by hav-

ing the court told explicitly that he had called Special Forces personnel "killers of peasants," and "murderers of women and children," had told enlisted men "they should refuse to go to Vietnam," and had written, "Is Communism worse than a U.S. oriented government? . . . I doubt it." We are unable to reconstruct by hindsight on the basis of reasonable predictability of human behavior, a jurisprudential setting in which a fact-finding panel of military officers could have been immunized, in theory or in fact, from the inflammatory effect of such statements derogating the very military apparatus which the factfinders were sworn to defend and protect.

This being so, we turn to the teachings of *Kottekos, supra*: "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765. We are left in grave doubt.

The judgment of the district court will be reversed and the cause remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authori-

ties shall grant to Howard B. Levy a new trial on the Article 90 charge.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

213. ARTICLE 134—GENERAL ARTICLE

a. GENERAL

Discussion. Article 134 makes punishable all acts not specifically proscribed in any other article of the code when they amount to disorders or neglects to the prejudice of good order and discipline in the armed forces or to conduct of a nature to bring discredit upon the armed forces, or constitute noncapital crimes or offenses denounced by enactment of Congress or under authority of Congress. If conduct of this nature is specifically made punishable by another article, it should be charged as a violation of that article; and if it is not specifically made punishable by another article it should be charged as a violation of Article 134. But see 212. The specification alleging a violation of Article 134 need not expressly allege that the conduct was a disorder or neglect, or that it was of a nature to bring discredit upon the armed forces, or that it constituted a crime or offense not capital. Under a specification alleging a violation of Article 134, a finding of guilty may properly be returned if the court-martial is convinced beyond a reasonable doubt that the acts of the accused constituted a disorder or neglect to the prejudice of good order and discipline in the armed forces, that his conduct was of a nature to bring discredit upon the armed forces, or that his conduct violated an applicable statute enacted by or under authority of Congress. The same conduct may constitute a disorder or neglect to the prejudice of good order and disci-

pline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction. See 213*d*.

b. 'DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

Discussion. The disorders and neglects punishable under this clause of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of prejudicial disorders and neglects in the case of an officer are rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness; and allowing a member of his command to go on duty knowing him to be drunk.

Instances of prejudicial disorders and neglects in the case of enlisted persons are appearing in improper uniform; wrongfully abusive use of military vehicles; careless discharge of firearms; and impersonating an officer.

A *breach of a custom of the service* may result in a violation of this clause of Article 134. In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violation of the regulations in which they appear.

It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug. Possession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears. A person's possession or use of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud, when he possesses it in the performance of his duty, or

when his possession or use of marihuana or a narcotic drug is without knowledge of the presence or the nature of the substance (see 154a(4)). If an issue is raised by the evidence as to whether possession or use by an accused charged with this offense was innocent on one of these grounds, a showing that it was not innocent on that ground becomes a requirement of proof.

c. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

Discussion. "Discredit" as here used means "to injure the reputation of." This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Any discreditable conduct not denounced by a specific article of the code is punishable under this clause. Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces. Included within the conduct which may be found to be within the proscription of this clause are adultery, bigamy, negligent homicide, fleeing the scene of an accident, indecent acts, and dishonorable failure to pay debts.

d. GENERAL REQUIREMENTS OF PROOF UNDER ARTICLE 134

The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital (213e), the proof must

establish every element of the crime or offense as required by the applicable law. One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213f and should be included in instructions as to the elements of these offenses, in addition to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

(1) That the accused did or failed to do the acts, as alleged; and

(2) That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

e. CRIMES AND OFFENSES NOT CAPITAL

Crimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another article, which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.

State and foreign laws are not included within the crimes and offenses not capital referred to in Article

134 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under section 13 of title 18 of the United States Code. On the other hand, an act which is a violation of a State law or a foreign law may constitute a disorder or neglect to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134.

For the purpose of court-martial jurisdiction, the laws which may be applied under the clause, "crimes and offenses not capital," are divided into two groups:

(1) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses denounced by the United States Code, such as counterfeiting (18 U.S.C. § 471), various frauds against the Government not denounced by Article 132, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 134 to all persons subject to the code regardless of where the wrongful act or omission occurred. The Narcotic Drugs Import and Export Act (21 U.S.C. §§ 171-185) falls within this group, being applicable to the importation of proscribed drugs not only into areas over which the United States is sovereign but also into territories subject to the control of the United States for a special purpose, including military installations on foreign soil.

(2) *Crimes and offenses of local application.* Those noncapital crimes and offenses which are listed in the United States Code but which are

limited in their applicability to the special maritime and territorial jurisdiction of the United States as defined in the United States Code, those applicable within the continental United States, and those included in the law of the District of Columbia, in the law of a commonwealth, Territory or possession of the United States, and in the laws applicable in reservations or places over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, which are not specifically included in another article of the code, are made applicable under Article 134 to all persons subject to the code who commit these crimes or offenses within the geographical boundaries of the areas in which they are applicable. For the law applicable in a reservation or a place over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, see 18 U.S.C. § 13. A person subject to the code cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense, not capital, if the act occurred in a place where the law in question did not apply. For example, a person cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense not capital, when the act occurred in occupied foreign territory merely because that act would have been an offense against the law of the District of Columbia if it had been committed there. Such an act might, however, regardless of where committed, in a proper case be prosecuted under the first or second clause of Article 134 as a disorder or neglect to the prejudice of good order and discipline or as an offense of a nature to bring discredit upon the armed forces.

f. VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

(1) ASSAULTS INVOLVING INTENT TO COMMIT CERTAIN OFFENSES OF A CIVIL NATURE

Discussion. See 207 (Assault). The assaults here designated as being punishable under Article 134 are those perpetrated with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. An assault with intent to commit an offense is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that degree of proximity to consummation of an intended offense which is essential to an attempt. See 159.

Some of these assaults will be discussed below.

(a) *Assault with intent to murder.* This is an assault committed with a specific intent to kill, under such circumstances that, if death resulted therefrom, the offense of murder would have been committed. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, if a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. When the intent to murder exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impossible is not a defense if the means are apparently adapted to the end in view. Thus, if a

person intending to murder another loads his rifle with what he believes to be a live cartridge and aims and discharges his rifle at the other, it is no defense that, by accident, he uses a dummy cartridge.

The intent to murder need not be directed against the person assaulted if the assault is committed with intent to murder some person. If the accused, intending to murder A, shoots at B, mistaking him for A, he is guilty of assaulting B with intent to murder him. Also, if a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group.

(b) *Assault with intent to commit voluntary manslaughter.* This is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for involuntary manslaughter is not a crime capable of being intentionally committed.

(c) *Assault with intent to commit rape.* This is an assault committed by a man with a specific intent to have sexual intercourse with a woman not his wife by force and without her consent. The accused must have intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. Any lesser intent will not suffice. Indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape amounting to an assault. Thus, if a man, intending to rape

a woman, conceals himself in her room to await a favorable opportunity to execute his design, but before the opportunity arises is discovered and flees, he is not guilty of an assault with intent to commit rape.

No actual touching is necessary. If a man enters a woman's room and gets in the bed where she is for the purpose of raping her, he commits the offense under discussion although he does not touch the woman.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Lesser offenses that may be included in a charge of assault with intent to rape are indecent assault and assault.

(d) *Assault with intent to rob.* This is an assault committed with a specific intent to steal property by taking it from the person or in the presence of another, against his will, by means of force or violence or putting him in fear. The fact that the accused intended to take only money and that the person he intended to rob had none is not a defense.

(e) *Assault with intent to commit sodomy.* The assault must be against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

Proof. (a) That the accused assaulted a certain person, as alleged; (b) that the accused at the time of the assault had a specific intent to kill, as required for murder or voluntary manslaughter, or to commit

rape, robbery, sodomy, arson, burglary, or house-breaking, as alleged; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) INDECENT ASSAULT

Discussion. See 207 (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female not his wife without her consent and against her will, with intent to gratify his lust or sexual desires. In a proper case indecent assault may be an included offense of assault with intent to commit rape.

Proof. (a) That the accused assaulted a certain female not his wife by taking indecent, lewd, or lascivious liberties with her person; (b) that the acts were done with intent to gratify the lust or sexual desires of the accused; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS

Discussion. This offense consists of taking any immoral, improper or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of any child of either sex under the age of

16 years with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. When the accused is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but it is not essential that the evidence show physical contact between the accused and the child. Thus, one who with the requisite intent exposes his private parts to a child under the age of sixteen years may be found guilty of this offense. Nonconsent by the child to the act or conduct is not essential to this offense, nor is consent a defense.

Proof. (a) That the accused took certain immoral, improper or indecent liberties with a certain child, as alleged; or that he performed a certain lewd or lascivious act upon or with the body of a certain child, as alleged; (b) that the child was under the age of 16 years, as alleged; (c) that the intent of the accused was to arouse, appeal to, or gratify the lust or passions or sexual desires of the accused or the child or both, as alleged; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) FALSE SWEARING

Discussion. False swearing is the making under lawful oath, not in a judicial proceeding or course of justice, of any false statement, oral or written,

not believing the statement to be true. It may consist, for example, in making a false oath to an affidavit. The oath may be taken before any person authorized by law to administer oaths. See Article 136 and chapter XXII as to the authority of certain persons to administer oaths, and see 147a as to taking judicial notice of the signatures of persons authorized to administer oaths. An oath includes an affirmation when the latter is authorized in lieu of an oath.

The principles set forth in the last two paragraphs of the discussion of perjury in 210 apply also to false swearing.

Proof. (a) That the accused took an oath or its equivalent, as alleged; (b) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (c) that the oath was administered by a person having authority to do so; (d) that upon this oath the accused made or subscribed a certain statement, as alleged; (e) that the statement was false; (f) that the accused did not believe the statement to be true; and (g) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISLOYAL STATEMENT UNDERMINING DISCIPLINE AND LOYALTY

Discussion. Certain disloyal statements by military personnel may lack the necessary elements to consti-

tute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.

Proof. (a) That the accused made the disloyal statement, as alleged; (b) that the accused at the time of making the statement did so with the design alleged; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) MISPRISION OF A FELONY

Discussion. A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known the same to the civil or military authorities is guilty of misprision of the felony. Any offense of a civil nature punishable under the authority of the code by death or by confinement for a term exceeding one year is a felony. A mere failure or refusal to disclose the felony without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a felonious theft committed by another, and intimidating a witness of a felony, are examples of a positive act of concealment.

Proof. (a) That the accused had knowledge of the actual commission of a felony by another; (b) that he concealed and did not as soon as possible make known the felony to the civil or military authorities; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(7) DISHONORABLE FAILURE TO PAY DEBTS

Discussion. A dishonorable failure to pay a just debt under circumstances which bring or tend to bring discredit upon the armed forces or which are prejudicial to good order and discipline in the armed forces is an offense under this article. More than mere negligence in the nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations.

For a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to his belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment.

The length of the period of nonpayment and any denial of his indebtedness which the accused may have made may tend to prove that his conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that his conduct was in fact dishonorable.

A commissioned officer may be tried for this offense under either Article 133 or Article 134, as the circumstances may warrant.

Proof. (a) That the accused was indebted to a certain person or entity in a certain sum, as alleged; (b) that the debt became due and payable on or about a certain date, as alleged; (c) that at the time alleged while the debt was still due and payable, the accused dishonorably failed to pay the debt; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

**(8) DISHONORABLE FAILURE TO MAINTAIN FUNDS
FOR PAYMENT OF CHECKS**

Discussion. One who, having made and uttered a check, thereafter dishonorably fails to maintain sufficient funds in or credit with the drawee bank for its payment upon presentment, is chargeable under this article. This offense differs from the offense denounced by Article 123a in that there need be no intent to defraud or deceive at the time of making, drawing, uttering or delivery, and that the accused need not know at that time that he did not or would

not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument.

Mere negligence in maintaining one's bank balance is insufficient as a basis for this offense, and the accused's conduct must reflect bad faith or gross indifference in this regard. As in 213f(7), dishonorable conduct of the accused is necessary, and the other principles discussed in 213f(7) likewise apply.

Proof. (a) That the accused made and uttered a certain check, as alleged; (b) that thereafter the accused dishonorably failed to maintain funds in or credit with the drawee bank for payment of the check upon its presentment for payment in due course; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(9) BIGAMY

Discussion. Bigamy is the contracting of another marriage by one who already has a lawful spouse living. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was merely voidable and has not been voided by competent court action, this circumstance is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable (154a(4)).

Proof. (a) That, at the time and place alleged, the accused married a certain person, as alleged; (b) that, at the time of this marriage there existed a prior valid marriage entered into by the accused with another person, as alleged, which prior marriage was then undissolved; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(10) COMMUNICATING A THREAT

Discussion. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. The communication may be made to the person threatened or to another. To establish the threat it is necessary to show that the declaration in question was made. It is not necessary, however, that the accused actually entertained the intention stated in the declaration. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

Proof. (a) That the accused communicated certain language expressing a present determination or intent wrongfully to injure another person, as al-

leged, presently or in the future; (b) that the communication was made known to that person or to a third person, as alleged; (c) that the communication was wrongful and without justification or excuse; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(11) FALSE AND UNAUTHORIZED PASSES, PERMITS, DISCHARGE CERTIFICATES, AND IDENTIFICATION CARDS

Discussion. Certain acts with respect to military or official passes, permits, discharge certificates, or identification cards may be punishable under this article. The wrongful use, possession, sale, or other disposition of a false or unauthorized pass, permit, discharge certificate, or identification card with knowledge that it was false or unauthorized may be charged under this article. Although it is not necessary that the use, possession, sale, or disposition of the document be with an intent to deceive or defraud, the use or possession of a false or unauthorized document with such an intent is an aggravating circumstance authorizing more severe punishment. See 127c. See also 202A for a definition of intent to deceive and intent to defraud. The false making or altering of a military or official pass, permit, discharge certificate, or identification card may also be charged under this article. As to this offense, there is no requirement of knowledge or of an intent to deceive or

defraud. The phrase "military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies and facsimiles thereof.

Proof. Wrongful use or possession of a false or unauthorized pass, permit, discharge certificate, or identification card. (a) That the accused wrongfully used or had in his possession a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (b) that the pass, permit, discharge certificate, or identification card was false or unauthorized as alleged; (c) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; and, if alleged, (e) that the use or possession was with intent to deceive or defraud.

Wrongful sale or disposition of a pass, permit, discharge certificate or identification card. (a) That the accused wrongfully sold or disposed of a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (b) that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (c) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthor-

ized, as alleged; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Falsely making or altering a pass, permit, discharge certificate, or identification card. (a) That the accused wrongfully and falsely made or altered a certain military or official pass, permit, discharge certificate, or identification card, as alleged; and (b) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(12) NEGLIGENCE HOMICIDE

Discussion. Negligent homicide is any unlawful homicide which is the result of simple negligence. Simple negligence is a lesser degree of carelessness than culpable negligence. See 198b. It is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

Proof. (a) That the person named or described is dead; (b) that his death was unlawfully caused by the acts or omissions of the accused, as alleged; (c) that the acts or omissions of the accused constituted negligence; and (d) that, under the circumstances,

the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(13) OFFENSES AGAINST CORRECTIONAL CUSTODY

Discussion. Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15 (131c(4)) who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period. See 57b as to the manner of determining the legality of the imposition of correctional custody.

Proof. Escape from correctional custody. (a) That the accused was duly placed in correctional custody; (b) that, at the time and place alleged, the accused freed himself from the physical restraint of his correctional custody, as alleged, before having been released therefrom by proper authority; and (c) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Breach of correctional custody. (a) That the accused was duly placed in correctional custody; (b)

that while in such correctional custody, a certain restraint was imposed upon the accused; (c) that, at the time and place alleged, the accused broke this restraint, before having been released from the correctional custody or relieved of the restraint by proper authority; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(14) RECEIVING STOLEN PROPERTY

Discussion. "Receiving stolen property" is the receiving, buying, or concealing of any article or thing of value, the property of another person, with knowledge that the article or thing has been stolen.

While an actual thief is not criminally liable for receiving the property he has stolen, one who may be criminally responsible as a principal to the larceny, when not the actual thief (156), can be convicted of knowingly receiving the stolen property under Article 134. Thus, if A procures B to steal several items, agreeing to pay him a certain price for them, and B subsequently steals them and delivers them to A, A can be found guilty of knowingly receiving stolen property despite the fact that his conduct would make him guilty of larceny as a principal.

Proof. (a) That the accused received, bought, or concealed certain property of a value alleged; (b) that the property belonged to another person named

or described; (c) that the property had been stolen; (d) that the accused then knew that the property had been stolen; and (e) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

No. 71-1917

HOWARD B. LEVY

v.

JACOB J. PARKER, ETC., *et al.*

SEITZ, *Chief Judge*, concurring in part and dissenting in part.

While I agree with the well-reasoned opinion of the majority finding Articles 133 and 134 unconstitutionally vague, I cannot join in the majority's ultimate disposition of the case. I believe that despite the joinder of the Article 90 charge with the Articles 133 and 134 charges, there was no substantial prejudice to Captain Levy's constitutional right to a fair trial on the Article 90 charge.

As pointed out in the majority opinion, Captain Levy defended against the Article 90 charge on three counts: (1) the order was illegal because primarily motivated by a desire to increase punishment—a defense cognizable under the Uniform Code of Military Justice;¹ (2) the order was illegal because it ordered the defendant to commit a war crime—a defense likewise cognizable under the UCMJ; and (3) the order was illegal because it forced the defendant to violate his medical ethics—a defense not recognized under the UCMJ. It is to be noted that it was never

¹Hereafter cited as UCMJ.

contended by Captain Levy that he did in fact obey the order.

As a matter of law, only (1) and (2) were sustainable defenses, and only (1) was submitted to the court-martial. Point (2) was tried outside the hearing of the court-martial and only before the law officer because it involved an initial determination of law. Since that determination was made adversely to defendant by the law officer, it was never submitted to the court-martial for its consideration. Point (3) was ruled not to be a legal defense, and the law officer instructed the jury that even if they found such a conflict, they would not be entitled to acquit Captain Levy on that basis.

Against this background, this court's inquiry should be two-fold: (A) whether evidence introduced on the two unconstitutional charges substantially prejudiced Captain Levy's constitutional right to a fair trial on the Article 90 charge; and (B) whether the presumption of validity attaching to a general sentence is rebutted by direct evidence on this record, where there was joint consideration of the Article 90 charge with the other two unconstitutional convictions for sentencing purposes. A. The first inquiry necessarily must be whether the evidence on the unconstitutional charges prejudiced defendant's right to a fair trial on the Article 90 charge in derogation of his right to Fifth Amendment Due Process. However, because of the peculiarities of a court-martial proceeding, the applicable standard of review is by no means clear.

There are two elements not present in normal ci-

vilian proceedings which complicate our task on review in determining whether or not there was sufficient prejudice to warrant reversal. The first is that, as here, there can be joinder in one trial of offenses which have neither a common legal nor a common factual basis. Thus, Captain Levy was tried in one proceeding for violations of one set of Articles—133 and 134—which had common legal elements and could be proven by the introduction of similar evidence, and for violation of another Article—90—which involved completely separate legal elements and required totally different evidence for conviction. Federal rules of procedure would prohibit such a joinder in a federal civilian proceeding. Fed.R.Crim. P. 8. Thus, federal civilian courts would rarely if ever be faced with reviewing the type of situation with which we are here confronted.

The second element peculiar to the military judicial system is that a defendant can take the stand and limit testimony to any one charge, or any number of charges less than the whole, of his own choosing. This would seem to be a compensating factor for the military policy to join all serious offenses against a defendant into one trial, discussed above. Manual for Courts-Martial ¶¶ 30h, 33f (1951). For example, in the instant case, Captain Levy could have taken the stand solely to defend against the Article 90 charge without subjecting himself to examination on the Articles 133 and 134 charges. Thus, taking the witness stand in a court-martial proceeding does not operate as a complete waiver of one's Fifth Amend-

ment right against self-incrimination. Instead, it operates as a waiver only as to those charges specified by the defendant.

Because of these peculiarities extant only in the military system, and the resultant lack of actual similarity to seemingly analogous situations in civilian proceedings, the cases relied upon by the majority are not particularly enlightening. One line of cases involves introduction of unconstitutionally seized evidence probative of guilt on the offense charged. The second line of cases involves joined charges where incriminating evidence is introduced on one count which is subsequently determined unconstitutionally tainted, and that evidence overlaps as to elements of proof on the otherwise valid charge. However, none of these cases involve the type of situation present here where there is no overlap of probative evidence because of the joinder of distinct charges involving distinct and different legal and factual elements of proof.

The standard of review applied here by the majority — "reasonable possibility of prejudice" — was enunciated by the Supreme Court in *Fahy v. Connecticut*, 375 U.S. 85 (1963). Examination of that case only illustrates the differences confronting the Court there and that confronting the court here. In *Fahy*, the unconstitutional element was the introduction into evidence of a can of black paint which had been seized in violation of the Fourth Amendment. Defendant was charged with painting swastikas on synagogues. Therefore, the illegally seized evidence

tended to show participation in the criminal conduct charged. Necessarily, careful scrutiny was called for, since the tainted evidence directly reflected an inference of guilt. Development of this standard of close scrutiny, in fact, can be traced to the highly analogous situation involving introduction at trial of a coerced confession. However, those factual and legal situations are not analogous to the operative facts of the trial and evidence introduced in the instant case.

In *Benton v. Maryland*, 395 U.S. 784 (1969), we have an example of the second type of cases, involving a joinder of charges. There, the defendant had been tried on two related charges: burglary and larceny. The court held the larceny conviction had been obtained in violation of defendant's constitutional right against double jeopardy. Because it was a direct appeal, the court remanded the case for a determination of whether there was any prejudicial effect on the otherwise valid burglary conviction by reason of the joint trial. However, unlike the situation here with the joined Article 90 charge, there were similar and overlapping elements of proof between the larceny and burglary charges. Some of those elements which might have been related but inadmissible as evidence of guilt on the burglary charge may have been introduced as relevant evidence on the larceny charge. Further, joinder of the charges may have inhibited defendant's ability to offer exculpatory testimony on the burglary count. Similarly, the joinder of the two related charges may have indicated to the

jury a propensity to engage in such conduct. Consequently, substantial potential for prejudice inhered in the very nature of the joinder there reviewed.

An interesting hybrid of these two types of cases is revealed in the case relied upon by the majority—*United States ex rel. Hitenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966). There the court faced a petitioner who had been tried once for first degree murder and had been convicted of second degree murder. On appeal, the state court reversed his conviction. In a subsequent trial, he was again charged with first degree murder and found guilty of second degree murder. On collateral attack, the court of appeals annulled the conviction as having been obtained in violation of petitioner's right against double jeopardy. In making its review, the court applied the "reasonable possibility of prejudice" standard set out in *Fahy*.

I submit that that situation differs markedly from the one before us. The entire proceeding in *Hitenyi* was a product of a violation of defendant's constitutional right against double jeopardy. The second trial was grounded upon the constitutionally tainted charge—first degree murder, and it was only because of the doctrine of lesser included offenses that the jury was able to bring in a lesser conviction. However, none of these various elements appear in the instant case. The evidence which was introduced as to defendant's criminal conduct under the two unconstitutional articles was completely separable from the evidence used to convict on the Article 90 charge.

Further, there is ample indication that the court-martial did in fact separate out the elements of the various charges and brought in independent convictions on the unrelated counts. Additionally, Captain Levy could have exercised his right to take the stand and testify only concerning the Article 90 charge without waiving his right not to testify on the other charges. Consequently, his ability to offer personally exculpatory evidence was not infringed by reason of the joinder. In fact, the law officer carefully made clear to defendant that he had the right to select those charges on which he would and would not testify. Finally, because of our limited scope of review in military habeas corpus, we should stay our hand unless the requisite prejudice is established. In light of these considerations, I cannot agree with the majority that the applicable standard of review as to the Article 90 charges is whether there is a "reasonable possibility of prejudice." Rather, I believe the applicable standard of review should be whether defendant's right to a fair trial on the Article 90 charge was substantially prejudiced by its joinder with the unrelated unconstitutional charges.

Applying this standard of review, the critical determination becomes whether the joinder of the charges affected the ability of the fact finders to separate out the component charges and to make a factual determination of guilt on the Article 90 charge based solely on the evidence relevant to that charge. Even assuming the burden of proof to be on the Government, after an extensive examination of

the record, I am satisfied the joinder of the charges at trial did not substantially prejudice Captain Levy's constitutional right to a fair trial on the Article 90 charge.

I consider four points dispositive in reaching this conclusion. First, defendant never contended that he obeyed the order. Nor was any rebuttal offered to the Government's proof that the order was not obeyed. Therefore, the court-martial could find conclusively that the order in fact was not obeyed.

Secondly, I note that the court-martial was presented with overwhelming evidence that the order did not have as its primary motive the increasing defendant's punishment. Not only did the court-martial have the benefit of extensive testimony by Colonel Fancy, the commanding officer of the hospital, who gave the order, but it had the benefit of examining the order of events in reaching a sustainable conclusion on this point. These events showed that while the order was given in early October, Colonel Fancy continued his efforts to persuade Captain Levy to comply with the order even after the initial refusal to obey. Only after several attempts at such persuasion had been rejected by Captain Levy did Colonel Fancy finally press charges. Colonel Fancy initiated this action in November, a month after the giving of and initial refusal to comply with the order. The court was not presented with a situation where the order was given one day and the charge drawn up the next.

Thirdly, of the five charges and specifications brought against Captain Levy under the three articles—90, 133 and 134, the court-martial brought back verdicts consistent with the indictment on only the three charges here under review. On the two remaining charges, the court brought in verdicts for lesser offenses, tantamount under the UCMJ to an acquittal on those charges. However much the majority may discount it, this shows a discrimination by the members of the court-martial as to the evidence relating to the various charges; such discrimination is extremely relevant in the light of the presence of the other elements which I find militate in favor of upholding this conviction.

Fourthly, much of the allegedly inflammatory evidence introduced at trial was brought out by the defense in its effort to prove the improper motivation behind the order. On retrial, I do not see how an effective defense to the Article 90 charge could be predicated upon this ground without a similarly exhaustive examination of this subject matter by defense counsel.

This last conclusion is not based upon mere speculation as to what might happen, as contended by my colleagues. Rather, it is based upon a frank examination of applicable military-law. Captain Levy defended on three grounds. None of these involved the defense that he attempted to obey the order; instead, they were exculpatory defenses for his failure to obey the order.

The third defense raised—that the order was

against medical ethics—would not appear to be a valid defense under the UCMJ. Further, I agree with the majority's conclusion that the law officer's refusal to recognize this defense raises no substantial constitutional question. The second defense—that defendant was ordered to commit war crimes—was decided adversely to defendant as a matter of law outside the hearing of the court-martial; elements of the third defense could conceivably be subsumed into the second. I do not understand the majority to contend that the law officer was prejudiced in his conduct of the trial by the joinder of charges into one trial, nor do I believe such a position sustainable. Neither do I think the refusal to recognize this second defense resulted in constitutional error. Thus, defendant was relegated—and at a future trial would be relegated, accepting the validity of the law officer's conclusions on the war crimes issue as we must—to predicated a successful defense upon proving the order was illegal because given primarily to increase punishment—the first defense. Because of this, because of the overwhelming evidence against defendant on this point the first time around, and because the joinder of charges did not prejudice Captain Levy's right to offer testimony in defense to this charge only, I conclude that no substantial prejudice to Captain Levy's constitutional right to a fair trial on the Article 90 charge appears on this record.

B. Having made this initial determination, the next issue is whether the presumption of validity which attaches to the general sentence under the *Claasen*

rule is rebutted. *Claasen v. United States*, 142 U.S. 140 (1891).² If there be a valid charge found on review, and the general sentence imposed does not exceed the statutory maximum which could be imposed on that charge, a presumption attaches that the court sentenced only on the valid charge. Therefore, the test becomes whether, from direct evidence on the record, the presumption of validity which here attaches to the general sentence is rebutted by the court-martial's consideration of the valid Article 90 conviction together with the two constitutionally invalid convictions for sentencing purposes.

This is to be distinguished from the initial determination made in (A). There, the issue was whether the joinder of the charges prejudicially affected the ability of the fact finders to separate out the particular charges and to make a factual determination as to the Article 90 charge solely on the evidence relevant to that charge. Here, however, the question is whether there is affirmative evidence on the record that once a determination of guilt was made as to each of the charges, the court-martial considered the invalid convictions together with the valid Article 90 conviction in arriving at the general sentence ultimately imposed.

It is to be emphasized that much more is required to rebut the presumption than the mere fact that the court-martial retired to consider the sentence having all three convictions before them. Rather, strong and convincing evidence rebutting the presumption under

² See discussion in majority opinion at 8-9.

Claasen would have to appear on the face of the record; the burden of proof is on the defendant. Absent such evidence, the presumption becomes conclusive in this case since the three year general sentence imposed was within the statutory maximum available for conviction under Article 90. In my scrutiny of the record, I have not found any such direct manifestation of impropriety in the sentencing sufficient to rebut the *Claasen* presumption. Consequently, I find no basis on which to vacate this sentence.

In short, I believe this record reflects no substantial prejudice to defendant by reason of a joint trial on all the charges; neither do I find the presumption attaching to the general sentence rebutted. Thus, while I agree with the majority that Articles 133 and 134 are unconstitutional, I would affirm the judgment of the district court denying the writ.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 71-1917

HOWARD B. LEVY, APPELLANT

vs.

**JACOB J. PARKER, as Warden, United States Peni-
tentiary, Lewisburg, Pennsylvania, and STANLEY
R. RESOR, as Secretary of the Army**

(D. C. Habeas Corpus No. 1057)

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

**Present: SEITZ, Chief Judge and ALDISERT and
ROSENN, Circuit Judges**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1971, be, and the same is hereby reversed, and the cause remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard

B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ Thomas F. Quinn
Clerk

April 18, 1973

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 1057 Habeas Corpus

HOWARD B. LEVY, PETITIONER

v.

JACOB J. PARKER, as Warden, United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army, RESPONDENTS.

MEMORANDUM

Petitioner's petition for a writ of habeas corpus is before the court.

A summary of the background of this proceeding is set forth in the opinion denying petitioner's motions for disclosure of information obtained by eavesdropping, and for an order to produce and permit inspection of 437 questionnaires and for 100 pages of a 180-page investigative file (G-2 dossier) which petitioner had been denied permission to review during Army court martial proceedings. *Levy v. Parker*, M.D. Pa. 1970, 316 F. Supp. 473.

Prior to the final hearing on the petition, petitioner filed an application for reconsideration of the denial of the motion for production of documents. This application was based "on the ground newly discovered evidence regarding military surveillance

of civilian organizations and activities as disclosed by Robert F. Froehlke, Assistant Secretary of Defense, to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee and released on March 2, 1971 (attached hereto as Exhibit B) and the disclosure of the Department of the Army's Civil Disturbance Information Collection Plan, 117 Cong. Rec. S2290 (daily ed. March 2, 1971) (attached hereto as Exhibit C)." These documents show that the military service engaged in extensive surveillance of civilian activities during the civil disturbance of the 1960's. Apparently petitioner believes that he may have been one of those upon whom surveillance was conducted during his pre-service or off-duty political activities. At the final hearing counsel for the respondents reiterated the Army's previous representation that it has no information concerning defendant, which was obtained by eavesdropping, and states in his brief that "respondent denies any knowledge whatsoever concerning any alleged surveillance by agents of the United States respecting petitioner at any time pertinent to his conviction that was not contained in the Army counter-intelligence file examined by petitioner's military counsel and *in camera* by the law officer at the trial." The application for reconsideration will be denied.

At the hearing the parties did not offer any evidence but rested on the voluminous records filed with the petition. The hearing on the petition, therefore, was limited to the arguments of counsel.

Petitioner contends that his statements, letters and

political activities giving rise to the speech charges were absolutely protected by the first amendment; and that, if not absolutely protected, they did not constitute a clear and present danger of creating disloyalty and disaffection among the troops, and impairing the loyalty, discipline and morale of the Armed Forces. Petitioner also contends that the issuance of the order to train special forces troops in dermatology, which petitioner disobeyed, and the elevation of charges to general court martial was a plot by Colonel Fancy, Agent West and others to punish him for his political views and activities, and his racial views.

The cases are legion which hold that first amendment rights and other constitutional rights are not absolute when they conflict with the protection of the common good of the people of the United States. It is clear from the record that petitioner's first amendment rights were not absolute. It is also clear that the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged in the court martial proceedings, and that the record does not support petitioner's assertions that the proceedings, and their elevation to general court martial grew out of a plot to "get" him for his speech, pre-service and political activities. In any case, the military tribunals have given fair consideration to petitioner's contentions. It is not proper for this court to reweigh each item of evidence. *United States ex rel. Thompson v. Parker*, 3 Cir. 1969, 399 F. 2d 744:

"Appellant next contends that the district court erred by relying upon the Supreme Court's decision in *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), for its holding that a district court's scope of review of proceedings in the military courts is limited to the question of whether or not the military tribunals gave due consideration to the petitioner's constitutional claims. In *Burns*, supra, the petitioners were found guilty by a court-martial of murder and rape and sentenced to death. After exhausting all military remedies, petitioners applied to a Federal district court for writs of habeas corpus, alleging that they had been denied due process of law, that they had been illegally detained, that coerced confessions had been extracted and that they had been denied effective representation by counsel. The district court, after satisfying itself that the military had complete jurisdiction, dismissed the applications without hearing evidence and without further review. On appeal, the Court of Appeals for the District of Columbia fully considered petitioners' allegations on their merits, reviewed the evidence in the record of the trial and other proceedings before the military courts, and affirmed. *Burns v. Lovett*, 91 U.S.App.D.C. 208, 202 F.2d 335 (C.A. D.C., 1952). Thereafter, the Supreme Court granted certiorari and affirmed the judgment of the court of appeals, but made it quite clear that it did not approve that court's procedure of 'reweighing each item of relevant evidence in the trial record,' especially since it was apparent from the records in the case that the military courts gave fair consideration to each of petitioners' claims.

"To correct any possible misunderstanding among the Federal courts as to the proper procedure to be followed in military habeas corpus cases, Mr. Chief Justice Vinson, in *Burns*, enunciated the following guideline:

" * * * Congress has provided that these determinations [fair determinations of military tribunals] are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U.S. 128, [71 S.Ct. 149, 95 L.Ed. 146] (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. *Whelchel v. McDonald*, 340 U.S. 122, [77 S.Ct. 146, 95 L.Ed. 141] (1950)." 346 U.S. at 142, 73 S.Ct. at 1049.

"We have already held in this opinion that the military courts dealt fully and fairly with the instant petitioner's constitutional claims. Under the principle announced in *Burns*, therefore, the district court, after determining that the military courts had given due consideration to petitioner's contentions, quite correctly refused to review and re-evaluate the facts surrounding petitioner's allegations. As noted by the district court in *Swisher v. United States*, 237 F.Supp. 921, at 928 (W.D. Mo. 1965), *aff'd*, 354 F.2d 472 (C.A. 8, 1966), '*Burns* is the law of the land.' And both this court and the

district courts must abide by its teaching.”
(Footnote omitted.)

The various articles of the Uniform Code of Military Justice are not unconstitutional for vagueness. United States v. Howe, 1967, 17 U.S.C.M.A. 165, 37 C.M.R. 429; United States v. Sadinsky, 1964, 14 U.S.C.M.A. 563, 34 C.M.R. 343; United States v. Frantz, 1953, 2 U.S.C.M.A. 161, 7 C.M.R. 37.

The petition for a writ of habeas corpus will be denied.

/s/ Michael H. Sheridan
Chief Judge
Middle District of Pennsylvania

Dated: June 30, 1971.

104a

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 1057 Habeas Corpus

HOWARD B. LEVY, PETITIONER,

v.

JACOB J. PARKER, as Warden, United States Peni-
tentiary, Lewisburg, Pennsylvania, and STANLEY
R. RESOR, as Secretary of the Army, RESPONDENTS.

ORDER

In accordance with memorandum this day filed,
it is ORDERED that the petition for a writ of
habeas corpus be and the same is hereby denied.

/s/ Michael H. Sheridan
Chief Judge
Middle District of Pennsylvania

Dated: June 30, 1971.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Number 71-1917

HOWARD B. LEVY

v.

JACOB J. PARKER, Warden of the United States
Penitentiary at Lewisburg, Pennsylvania
and

STANLEY R. RESOR, Secretary of the Army,
APPELLEES

NOTICE OF APPEAL

Notice is hereby given that the Appellees, Jacob J. Parker, Warden of the United States Penitentiary at Lewisburg, Pennsylvania, and Stanley R. Resor, Secretary of the Army, appeal to the Supreme Court of the United States, pursuant to Title 28, United States Code, Section 1252, from the Judgment of this Court entered on April 18, 1973, reversing the Judgment of the District Court.

Respectfully submitted,

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/s/ Carmen C. Nasuti
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on the 16th. day of May, 1973:

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~~MICHAEL DOBAX, JR., C~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States
Penitentiary, Lewisburg, Pennsylvania, and STANLEY
R. RESOR, as Secretary of the Army,
Appellants,

v.

HOWARD B. LEVY,
Appellee.

ON APPEAL FROM THE UNITED STATES
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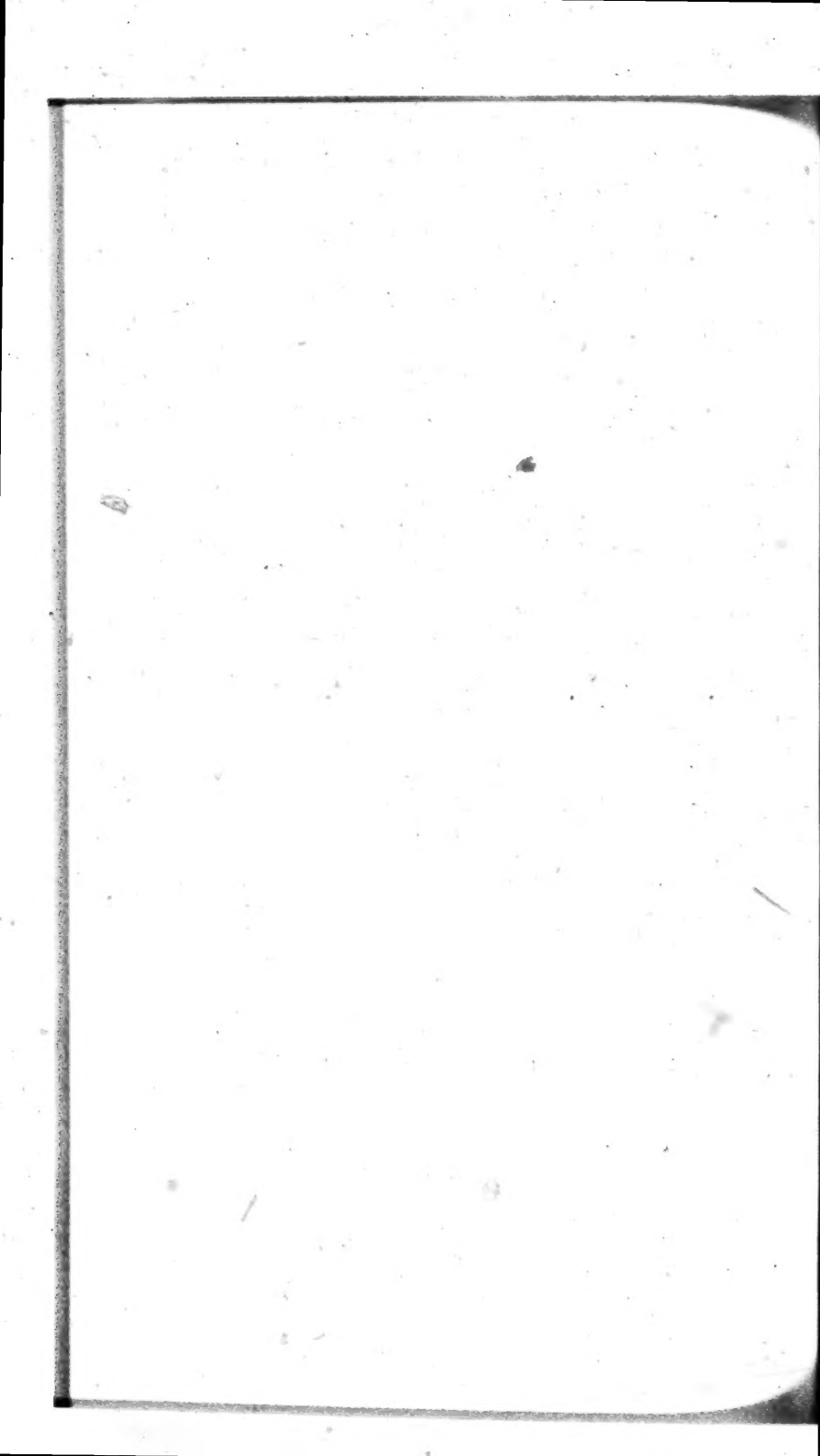
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INDEX

	Page
STATEMENT OF THE CASE.....	2
ARGUMENT.....	5
I. The Appeal Should Be Dismissed Because the Government's Notice Of Appeal Was Not Filed By Or On Behalf Of Counsel For Appellants and Failed to Comply With the Service Rule Of This Court.....	5
II. The Decision By the United States Court Of Appeals for the Third Circuit is So Obviously Correct as to Warrant No Further Review.....	8
A. Articles 133 and 134 Are Unconstitutional Because They are Void for Vagueness.....	8
B. The "Centuries Old" Argument Is Of No Value In This First Amendment-Due Process Prosecution. Retroactivity and "Profound Disruption" Are Not at Issue Here.....	15
III. The Free Speech Charges Violated the First Amendment.....	18
IV. The Article 90 Charge Should Remain Reversed Regardless Of the Disposition Of the Other Charges.....	19
V. The Judgment Of the Court Of Appeals Should Be Affirmed Because Of Numerous Constitutional Errors In the Court-Martial Of Dr. Levy.....	25
CONCLUSION.....	27
APPENDIX	
Charge II.....	1a
Additional Charge I.....	2a
Rule 10, Revised Rules of the Supreme Court.....	4a
Rule 33, Revised Rules of the Supreme Court.....	4a

TABLE OF AUTHORITIES

Cases:	Page
<i>Abrams v. United States</i> , 250 U.S. 616 (1919).....	19
<i>Avrech v. Secretary of the Navy</i> , 477 F.2d 1237 (D.C. Cir. 1973), jurisdictional statement filed sub nom. <i>Secretary of the Navy v. Avrech</i> , 41 U.S.L.W. 3674 (No. 72-1713, June 18, 1973).....	15,16
<i>Carmichael v. Allen</i> , 267 F. Supp. 985 (N.D. Ga. 1966).....	14
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	25
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971).....	12
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	19
<i>Connally v. General Construction Company</i> , 269 U.S. 385 (1926).....	8
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970).....	25
<i>DeGregory v. New Hampshire</i> , 383 U.S. 825 (1966).....	19
<i>Dennis v. United States</i> , 341 U.S. 494 (1951).....	19
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965).....	8
<i>Dynes v. Hoover</i> , 61 U.S. [20 How.] 65 (1858).....	16
<i>Estes v. State of Texas</i> , 381 U.S. 532 (1965).....	24
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963).....	25
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	11
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972).....	12
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	20
<i>Hooper v. Laird</i> ,F.2d...., (D.C. Cir. 1973) (No. 72-1198, decided August 3, 1973).....	16,17
<i>Jackman v. Rosenbaum Co.</i> , 260 U.S. 22 (1922).....	16
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946).....	22,24

TABLE OF AUTHORITIES (Continued)

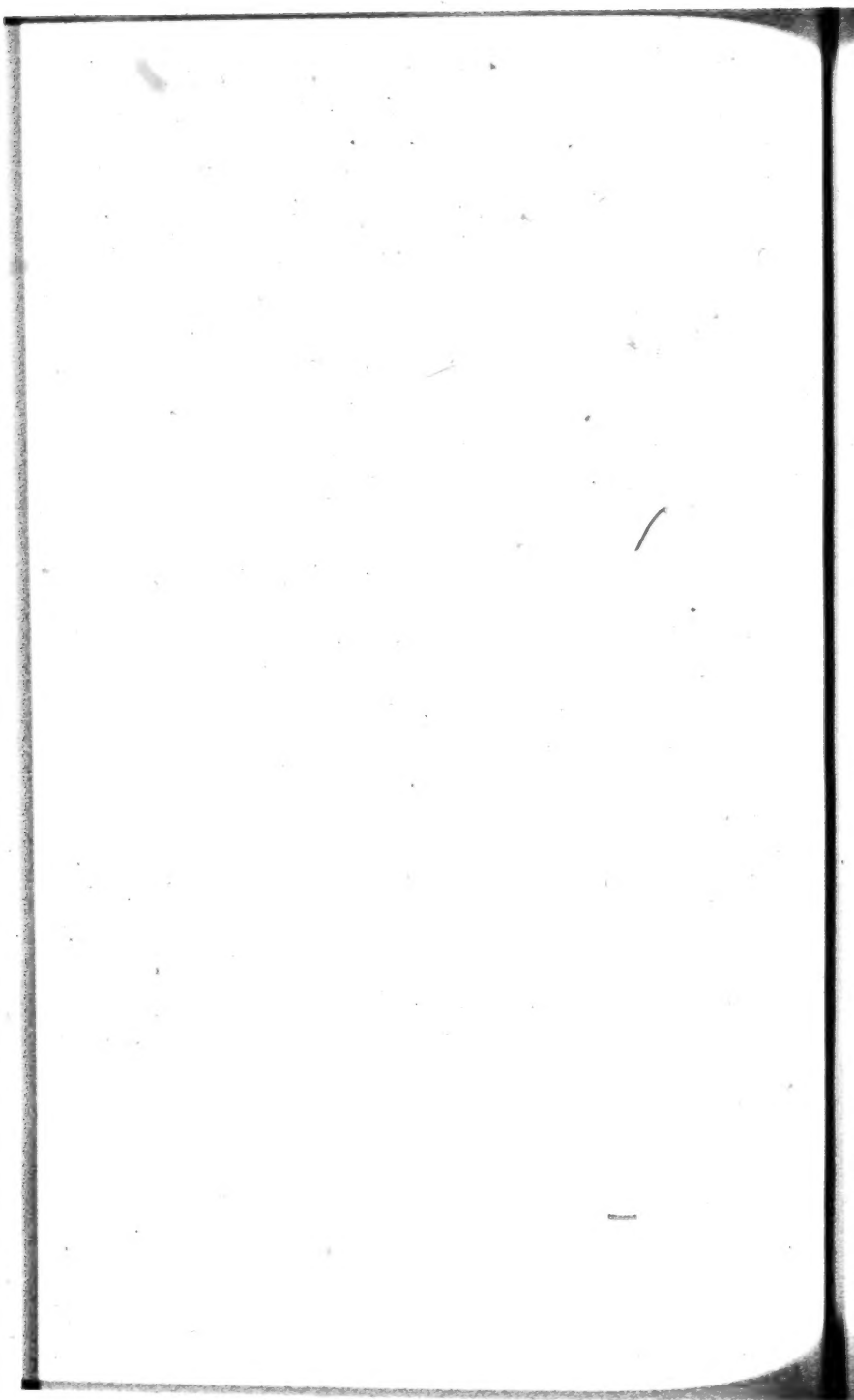
	Page
Cases—Continued:	
<i>Levy v. Corcoran</i> , 389 F.2d 929 (D.C. Cir. 1967), stay and cert. denied, 387 U.S. 915, 389 U.S. 960 (1967).....	4,17
<i>Levy v. Dillon</i> , 286 F. Supp. 593 (D. Kan. 1968), aff'd 415 F.2d 1263 (10th Cir. 1969).....	4
<i>Levy v. Parker</i> , 396 U.S. 1204, 396 U.S. 804 (1969).....	4
<i>Levy v. Resor</i> , 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).....	4
<i>Levy v. Resor</i> , Civ. No. 67-422 (D.S.C. July 5, 1967), aff'd per curiam, 384 F.2d 689 (4th Cir. 1967), cert. denied, 389 U.S. 1049 (1968).....	4
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971).....	19
<i>Morissette v. United States</i> , 342 U.S. 246 (1952).....	20
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	8,12
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	11
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1968).....	8
<i>Pointer v. United States</i> , 151 U.S. 396 (1894).....	24
<i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	8
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969).....	8
<i>Smith v. Whitney</i> , 116 U.S. 167 (1886).....	16
<i>Stolte v. Laird</i> , 353 F. Supp. 1392 (D.D.C. 1972).....	14,17
<i>Street v. New York</i> , 394 U.S. 576 (1969).....	11
<i>Stromberg v. California</i> , 283 U.S. 359 (1931).....	12
<i>Swarb v. Lennox</i> , 405 U.S. 191 (1972).....	25

TABLE OF AUTHORITIES (Continued)

	Page
Cases—Continued:	
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949).....	11,14
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	12
<i>United States v. Frantz</i> , 2 U.S.C.M.A. 161 (1953).....	12
<i>United States v. Gainey</i> , 380 U.S. 63 (1965).....	20
<i>United States v. Levy</i> , 39 C.M.R. 672 (1968), <i>petition for review denied</i> , 18 U.S.C.M.A. 627 (1969).....	4,21
<i>United States v. Reese</i> , 92 U.S. 214 (1876).....	13
<i>United States v. Romano</i> , 382 U.S. 136 (1965).....	20
<i>Whelchel v. McDonald</i> , 340 U.S. 122 (1950).....	14
<i>Williams v. United States</i> , 168 U.S. 382 (1897).....	24
Statutes:	
Article 6 (c) UCMJ, 10 U.S.C. §806 (c).....	26
Article 15 UCMJ, 10 U.S.C. §815.....	3
Article 32 UCMJ, 10 U.S.C. §832.....	26
Article 36 UCMJ, 10 U.S.C. §836.....	25
Article 59 (a) UCMJ, 10 U.S.C. 859 (a).....	24
Article 90 UCMJ, 10 U.S.C. §890.....	<i>passim</i>
Article 133 UCMJ, 10 U.S.C. §933.....	<i>passim</i>
Article 134 UCMJ, 10 U.S.C. §934.....	<i>passim</i>
28 U.S.C. §1252.....	7
Rules:	
Rule 10.2, Revised Rules of the Supreme Court of the United States.....	6
Rule 16, Revised Rules of the Supreme Court of the United States.....	1

TABLE OF AUTHORITIES (Continued)

Rules—Continued:	Page
Rule 16.1 (a), Revised Rules of the Supreme Court of the United States.....	5
Rule 18.1, Revised Rules of the Supreme Court of the United States.....	7
Rule 33, Revised Rules of the Supreme Court of the United States.....	6,7
Rule 8, Federal Rules of Appellate Procedure.....	7
Rule 41 (b), Federal Rules of Appellate Procedure.....	7
Rule 62, Federal Rules of Civil Procedure.....	7
Rule 8, Federal Rules of Criminal Procedure.....	25
Other Authorities:	
Army Regulation, A.R. 40-554, para. 5.....	20
Army Regulation, A.R. 600-20, para. 42.....	16
Manual for Courts-Martial United States 1969 (Revised Edition).....	<i>passim</i>
G. Myrdal, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY, 103 (1944).....	21
Oath of Hippocrates.....	20
Stern & Gressman, SUPREME COURT PRACTICE (4th Ed.) §2.5.....	7
Technical Bulletin, T.B. Med. 230, Treatment and Management of Venereal Disease, 7 July 1965, §53 d(2).....	20
Warren, The Bill of Rights and the Military, 37 N.Y. U.L. Rev. 181 (1962).....	19



IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States
Penitentiary, Lewisburg, Pennsylvania, and STANLEY
R. RESOR, as Secretary of the Army,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the opinion and order of the court of appeals be affirmed or the appeal be dismissed on the grounds that appellants did not properly effect an appeal in compliance with the rules of this Court, that the questions presented warrant no further argument, and that other grounds raised by appellee below but not relied upon by the court of appeals justify the decision below.

STATEMENT

Appellee, Dr. Howard B. Levy, formerly a Captain in the United States Army, entered active duty on July 9, 1965. He was assigned to the United States Army Hospital, Fort Jackson, South Carolina, as Chief of Dermatology.

On September 10, 1965, appellee wrote an eight-page letter expressing his views on American foreign and domestic policy to a sergeant then stationed in South Viet Nam.¹

During the year 1966, Dr. Levy engaged in private and informal conversation with army personnel, enlisted men and officers, expressing disagreement with American foreign policy in general and Vietnamese policy in particular. He critically discussed what he believed to be national policy regarding the rights of black citizens. Dr. Levy was accused in Additional Charge I of stating to Special Forces personnel, other personnel under his supervision, and patients, that he considered Special Forces personnel "liars and thieves," "killers of peasants," and "murderers of women and children." He was also accused of stating that "the

¹ The two charges relating to the letter were reduced to lesser included offenses by the court-martial and, following their reduction, were dismissed on June 3, 1967. These specifications, Additional Charges II and III, are found at Jurisdictional Statement Appendix, p. 4a, n. 1.

The five charges were as follows:

Charge I—Article 90 (disobedience of order)

Charge II—Article 134 (General Article)

Additional Charge I—Article 133 (conduct unbecoming an officer and a gentleman)

Additional Charge II—Article 133 (conduct unbecoming an officer and a gentleman—dismissed at conclusion of court-martial)

Additional Charge III—Article 134 (General Article—dismissed at conclusion of court-martial).

United States is wrong in being involved in the Viet Nam War," that he would not serve in the war if ordered, and that "colored soldiers" were discriminated against and should not serve in the war. His words were described in Additional Charge I as being "intemperate," "defamatory," "provoking," "disloyal," "contemptuous" and "disrespectful." In Charge II it was charged that he did, "with design to promote disloyalty and disaffection among the troops, publicly utter . . . statements to divers enlisted personnel at divers times" "which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

On October 11, 1966—following visits from a special counter-intelligence agent to his commanding officer—Dr. Levy was ordered to train Special Forces Aidmen in dermatology, his medical specialty. Although he had trained all other military medical and para-medical personnel in dermatology, he declined on ethical grounds to provide Special Forces personnel the ten hours training sought. He contended these men were combat soldiers rather than Geneva Convention-protected and Army-defined medical personnel and that they were using medicine in Viet Nam for political and military rather than medical purposes.

Dr. Levy's commanding officer initiated Article 15, 10 U.S.C. §815, non-judicial punishment proceedings against him. He upgraded those charges to general court-martial level after reading and re-reading a G-2 dossier compiled on Dr. Levy and called to his attention by James B. West, Special Agent of the Counter Intelligence Corps, who resided in nearby Prosperity, South Carolina, where Dr. Levy had in his off-duty, out-of-

uniform hours engaged in a Negro voter registration drive.

Dr. Levy was tried for "conduct unbecoming an officer" and for violating the "General Article", Articles 133 and 134 Uniform Code of Military Justice, hereinafter UCMJ, 10 U.S.C. §933, 934, as well as for disobeying an order, Article 90, UCMJ, 10 U.S.C. §890.² Four of the five charges against Dr. Levy were based on pure speech, no conduct being alleged or proved. The fifth was based on his failure to obey the order to train Special Forces personnel.

On June 3, 1967, Dr. Levy was convicted by court-martial, sentenced to dismissal from the service, forfeiture of all pay and allowances and three years imprisonment at hard labor.³

He exhausted his military review procedures⁴ and then filed in the federal district court a petition for a writ of habeas corpus. It was denied on June 30, 1971.⁵

² The Article 90 Charge, Charge I, is found at Jurisdictional Statement Appendix, p. 2a. Charge II and Additional Charge I are set out in the appendix to this motion, p. 1a. *infra*.

³ On August 2, 1969, Mr. Justice Douglas ordered appellee released on bail pending habeas corpus. *Levy v. Parker*, 396 U.S. 1204 (1969). On October 13, 1969, this Court unanimously agreed. *Levy v. Parker*, 396 U.S. 804 (1969).

⁴ *United States v. Levy*, C.M. 416, 463, 39 C.M.R. 672 (1968), *petition for review denied*, No. 21, 641, 18 U.S.C.M.A. 627 (1969). Other proceedings are reported as follows: *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967) (sought to enjoin conduct of court-martial); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *Levy v. Resor*, Civ. No. 67-442 (D.S.C. July 5, 1967), *aff'd per curiam*, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049 (1968) (sought bail pending intra-military appellate review); *Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969) (regarding post-trial relief while incarcerated at United States Disciplinary Barracks pending intra-military appellate review).

⁵ See Jurisdictional Statement Appendix pp. 98a-103a.

An appeal of the denial of the habeas corpus was filed in the United States Court of Appeals for the Third Circuit. On April 18, 1973, the court of appeals reversed the district court holding Articles 133 and 134 unconstitutional and reversing the Article 90 charge for prejudicial joinder. It ordered

the cause [is] remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court.

Jurisdictional Statement Appendix, pp. 96a.*

I

THE APPEAL SHOULD BE DISMISSED BECAUSE THE GOVERNMENT'S NOTICE OF APPEAL WAS NOT FILED BY OR ON BEHALF OF COUNSEL FOR APPELLANTS AND FAILED TO COMPLY WITH THE SERVICE RULE OF THIS COURT.

Rule 16.1(a), Revised Rules of the Supreme Court of the United States provides:

The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

* The mandate of the court was duly entered on May 10, 1973. On July 13, 1973, the Government moved in the court of appeals to stay that portion of the court's mandate which required that Dr. Levy be granted a new trial within 90 days or the writ issue until such time as this Court could act on the appeal. Over objection of appellee, the court below ordered its mandate recalled (since the mandate had already issued) and stayed as requested provided the Government's appeal be docketed by July 30, 1973.

* Order of July 26, 1973.

The Government's notice of appeal is found at Jurisdictional Statement Appendix, pp. 105a, 106a. As it recites, service was accomplished by mailing copies of the notice to counsel for appellee by first class mail. It was certified by Carmen C. Nasuti, Assistant United States Attorney at Philadelphia, Pennsylvania. The only counsel names appearing on the notice and certificate of service are those of Nasuti and Robert E. J. Curran, United States Attorney.

The notice of appeal, filed with the clerk of the United States Court of Appeals for the Third Circuit was required to be served by Rule 10.2, Revised Rules of the Supreme Court of the United States, and to be served in the manner prescribed by Rule 33, Revised Rules of the Supreme Court of the United States.⁷ The notice and service are deficient in two respects.

(a) The notice was filed by and/or on behalf of Curran and Nasuti. Since neither at the time of filing was counsel of record, and since the record reveals no entry of appearance by said attorneys, Rule 33.4 renders the filing ineffective to give appellee notice that any appeal has been filed.⁸ The filing by legal strangers to this litigation was insufficient.

⁷ Relevant parts of Rules 10 and 33, Revised Rules of the Supreme Court of the United States, are set out in the appendix to this motion, p. 4a, *infra*.

⁸ Any doubt that the entry of appearance is required, even though the required notice is filed with the clerk of the court of appeals, is removed by the second sentence of Rule 33.3(b): "If counsel [a member of the bar of the Supreme Court of the United States] certifying to such service has not up to that time entered his appearance in this court in respect to the cause in which such service is made, his appearance shall accompany the certificate of service *if the same is to be filed in this court.*" (Emphasis added.) Rule 33.4 thus applies to counsel who files or has filed on his behalf a document in any court required to be filed by Supreme Court rules.

(b) The person effecting service, Nasuti, was not at the time of filing a member of the bar of this Court.⁹ Since Rule 33.3(b) allows only a member of the bar of this Court to certify service, whereas others must file an affidavit of service, Rule 33.3(c), Nasuti was required to file the latter. This was not done.¹⁰ The requirement of Rule 33 of proof of service was not met.

Because of appellants' failure to file an effective notice of appeal, this Court lacks jurisdiction and the case should therefore be dismissed.¹¹

⁹ Counsel for appellee have been so informed by the Clerk's office of this Court.

¹⁰ The record will reflect that there was no effort to complete proof of service by acknowledgment of service pursuant to Rule 33.3(a).

¹¹ Were it not for the lack of jurisdiction outlined above, there would be substantial question as to whether a valid appeal could be taken from the court of appeals under 28 U.S.C. §1252. Although the statutory language, "any court of the United States," is broad, the statute was intended to provide quick review from district court decisions. Stern & Gressman, SUPREME COURT PRACTICE (4th Ed.) §2.5, p. 31. No alternative quick review other than petition for certiorari is necessary from court of appeals judgments. An indication that Congress did not intend §1252 to be used as the Government here attempts is that there is no procedure for granting stays of judgment by inferior courts pending appeal from courts of appeals. A district court has power to stay judgments pending appeal. *E.g.*, Rule 62, Federal Rules of Civil Procedure, and a court of appeals may grant stays pending appeals to it. *E.g.*, Rule 8, Federal Rules of Appellate Procedure. But the appellate courts may stay only their own mandates pending petitions for certiorari, Rule 41(b), Federal Rules of Appellate Procedure, not appeals. Thus, despite the court below granting a stay citing Rule 18.1 of this Court, which means only that this Court will honor lower court stays but grants no power to grant such stays, Congress has provided no method for stays pending appeals from courts of appeals by said courts. This vacuum could not have been intended. The only rational conclusion is that there can be no such appeals. Review can be adequately had by petition for certiorari.

II.

DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

A. Articles 133 and 134 Are Unconstitutional Because They are Void for Vagueness.¹²

The court of appeals viewed the due process question with an eye to *O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1968), and concluded that this Court "has invited the federal courts to reexamine this due process question in the context of current constitutional teachings." Jurisdictional Statement Appendix, p. 31a. The court of appeals compared the ever-growing number of offenses cognizable under Article 134 with the basic concept of *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926), that:

a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .¹³

And, statutes must:

employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . .¹⁴

This Court has characterized Article 134 as an example of "... harsh law which is frequently cast in very sweeping and vague terms." *Reid v. Covert*, 354 U.S. 1,

¹² The court of appeals spoke of vagueness. The rationale of the opinion clearly encompassed overbreadth as well and will be treated as such.

¹³ Jurisdictional Statement Appendix, pp. 31a, 32a.

¹⁴ *Id.*, p. 32a.

38 (1957). In a long series of cases this Court has recognized the primacy of the first amendment and has resisted incursions of vague and overly broad statutes upon the area it protects. *E.g.*, *NAACP v. Button*, 371 U.S. 415 (1963); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

The court of appeals said:

The most recent articulation of the vagueness doctrine, representing a synthesis of past teachings, is found in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked." (Citations omitted.)

Failing to pass constitutional muster have been statutes penalizing "misconduct," *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); conduct that was "annoying," *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); "reprehensible," *Giaccio v. Pennsylvania, supra*; and "prejudicial to the best interest" of a city, *Gelling v. Texas*, 343 U.S. 960 (1952). Other federal courts have voided prohibitions of conduct that "reflects discredit," *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971); or is "offensive," *Oestreich v. Hale*, 321 F. Supp. 445 (E.D. Wis. 1970). (Footnote omitted.)

Jurisdictional Statement Appendix, pp. 32a, 33a.

The court of appeals framed the issues thusly:

Do Articles 133 and 134 give to a commissioned officer of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute? Do these articles encourage erratic arrests and convictions?

Jurisdictional Statement Appendix, p. 34a.

The answer to these questions required reversal.

The Government erroneously contends that the court of appeals "conceded . . . the conduct engaged in by Captain Levy fell unequivocally within the scope of certain specific examples set forth in the [UCMJ] *Manual's* description of conduct proscribed by Article 134 (App. A, *infra*, pp. 46a, 73a)." Jurisdictional Statement, p. 12. What the court of appeals actually said was:

Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense under Article 134, "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With the possible exception of the statement that "Special Forces are liars

and thieves and killers of peasants and murderers of women and children," it would appear that each statement for which appellant was court-martialed could fall within the example given in the *Manual. Jurisdictional Statement Appendix*, pp. 45a, 46a.¹⁵

The "possible exception" statement, of course, accompanied by those contained in the dismissed letter charges, was the key inflammatory statement, most likely to instill prejudicial reaction and affect the verdict. The Government's glossing over the lower court's refusal to hold that all the statements were within the example sidesteps the clear pronouncements of this Court that when a conviction is obtained under a general statute prohibiting several matters, one of which is constitutionally permissible, the conviction cannot stand. *Street v. New York*, 394 U.S. 576, 588 (1969); *Terminiello v.*

¹⁵ At the court-martial, Dr. Levy sought to prove truth as a defense to this pure speech charge. The law officer ruled truth was not a defense.

LAW OFFICER: The accused's *statements* as alleged, again, are basically expressions of opinion whose truth or falsity is hardly relevant. The inquiry in this case is and must be not their truth or falsity, but were these statements uttered with a design to promote disloyalty, and did they have a reasonable and natural tendency to do so.

R. Vol. 5, p. 876 (Emphasis added.) ["R" cites are to the military record introduced as exhibits below.]

INDIVIDUAL COUNSEL [Mr. Morgan]: Now, but I'm trying to ascertain—really to just get down to an instance, a position here, and that is that the question of objective truth doesn't matter, and consequently if objective truth were spoken and totally disrupted the Armed Forces, but what was said was true, a person would not be entitled to make those statements.

LAW OFFICER: Not as long as that Army won, I suppose.

R. Vol. 5, p. 884. (Emphasis added.)

The refusal to allow the defense mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964), clearly warrants reversal. See, *Whelchel v. McDonald*, 340 U.S. 122 (1950).

Chicago, 337 U.S. 1, 6 (1949); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931); *Thomas v. Collins*, 323 U.S. 516, 529 (1945). Since all of Levy's statements clearly do not fit within the *Manual's* example the Government misstates an argument which is in any event irrelevant since when first amendment defense of overbreadth is raised, the fact that the charged speech falls within the statutory prohibition does not prevent the accused from raising the defense. *E.g.*, *NAACP v. Button*, 371 U.S. 415 (1963).¹⁸

The ever growing number of offenses cognizable under Article 134 and the history of prosecutions led the court of appeals to term it "an unwritten criminal code, a catchall receptacle." Jurisdictional Statement Appendix, p. 36a. Disputing the rationale of *United States v. Frantz*, 2 U.S.C.M.A. 161 (1953), the court of appeals pointed out that the listed specifications fail to outline "with exactitude and limitation that conduct proscribed by Article 134." *Id.*, p. 37a. "... Article 134 is open ended." *Id.* That court of appeals pointed out that there is no unifying theme to the specifications, they comingle civilian offenses against persons, morals, and property with military offenses against, *e.g.*, the wearing of improper uniforms or firearms and military

¹⁸ The Government insists that the court of appeals "brushed aside" the issue of Levy's standing to assert vagueness. Of course the court below merely relied on *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *NAACP v. Button*, 371 U.S. 415, 433 (1963). Jurisdictional Statement Appendix, pp. 45a-47a. The Government's difficulty is that it seeks to apply *conduct* statutes to pure speech, and cannot refrain from terming Dr. Levy's speech "conduct." See Jurisdictional Statement, p. 13. But speech remains speech, and protected by the first amendment.

relationships. It quoted *United States v. Reese*, 92 U.S. 214, 221 (1876):

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be at large.

Id., p. 39a.

The vice of the General Article's invitation to assert criminal liability virtually without limitation is compounded by Executive rather than legislative drafting of the *Manual* and military adjudication of the charges brought under it.

Additionally, the court of appeals found it was unable to ascertain any Article 133 ("conduct unbecoming an officer and a gentleman") standard by which an officer could measure his conduct. *The Manual's* discussion of proscribed conduct, Jurisdictional Statement Appendix, pp. 34a, 35a, n. 24, has remained unchanged since 1886. *Id.*¹⁷ The court felt "far from satisfied" that the charge "replete with its capacity for subjective interpretation" satisfied due process standards. Jurisdictional Statement, p. 35a.

¹⁷ The law officer's instructions to the court substantially followed the *Manual*, para. 212; the key words being:

action or behavior in an official capacity which, in *dishonoring or disgracing the individual* as an officer, seriously compromises his character as a gentleman. . . . [T]he act . . . must have a *double significance* and effect . . . , it must offend so seriously against justice, law, morality or decorum as to *expose to disgrace*, socially, or as a man, the actor. *Additionally*, the act must . . . *bring dishonor or disrepute upon the military profession* which he represents. *Further*, unbecoming . . . mean[s] not merely inappropriate or unsuitable, as being opposed to good taste or propriety, or not consonant with usage, but *morally unbecoming and unworthy*. (Emphasis added.)

R. Vol. 9, p. 2597.

[footnote continued on next page]

Regardless of whether Articles 133 and 134 are constitutionally infirm, Levy's conviction would still be invalid because of the specifications on "disloyalty" and "disaffection." Despite the Government's contention that the disloyalty specification solves the due process problem —

Had Captain Levy desired to evaluate the lawfulness of his course of conduct, a short glance at the *Manual* would have resolved any doubts he might have entertained from a reading of the statutory provisions he attacks.

Jurisdictional Statement, p. 12.

— it fails to cite the Court to *Stolte v. Laird*, 353 F. Supp. 1392 (D.D.C. 1972), which held disloyalty specifications facially unconstitutional. The Government did not appeal. After repeated requests from defense counsel, the law officer held an out of court hearing in which he defined both "disloyalty" and "disaffection" using such words as "unfaithful," "disgust," or "discontent," and

[footnote continued from preceding page]

Dr. Levy, in his official capacity, must have so "dishonored" or "disgraced" himself that his own character was seriously compromised. But the witnesses had praise for his character. *E.g.*, R. Vol. 7, 2342-51. The record is barren of evidence to the contrary.

Also, he must so seriously have offended "decorum" as to disgrace himself as a man. Here again, there is no proof. No offense against "law," "justice" or "morality" is alleged or raised by the proof. Indecorum cannot be constitutionally prohibited. See *e.g.*, *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966) (three-judge court), but it is the only one of the four words that the specification under this charge could conceivably refer to.

Additionally, he must have brought "dishonor or disrepute upon the military profession which he represents." The prosecution offered no evidence that the Army had suffered any loss of public esteem because of Dr. Levy's statements.

Further, he must have offended not merely "good taste or propriety," but must have been "morally unbefitting and unworthy."

"ill will" (and with respect to "disaffection," the word "disloyalty").¹⁸ It is submitted that no one—not even the law officer and the lawyers, let alone Dr. Levy and the men who judged him—understood the charges.

B. The "Centuries Old" Argument Is Of No Value In This First Amendment-Due Process Prosecution. Retroactivity And "Profound Disruption" Are Not At Issue Here.

The Government's "centuries old" statute argument is misleading, since, as Mr. Justice Clark said, "[N]ot until 1951 did the disloyalty charge . . . become a badge of infamy within reach of the *Manual*." *Avrech v. Secretary of the Navy*, 477 F.2d 1237, 1241 (D.C. Cir. 1973) jurisdictional statement filed *sub nom. Secretary of the Navy v. Avrech*, 41 U.S.L.W. 3674 (No. 72-1713, June 18, 1973).¹⁹

¹⁸ The law officer continued:

Now here again, that is just a broad general statement, and I may not define those terms for the court in those terms because I am not satisfied with them myself. R. Vol. 7, p. 2191.

And when the court was charged, the law officer told the members that "disloyalty"

imports not being true to or being unfaithful to an authority to whom respect, obedience or allegiance is due and tending toward insubordination, refusal of orders, or mutiny. The term "disaffection" imports disgust and discontentment, ill will, disloyalty and hostility, toward an authority to whom respect, obedience, and allegiance is due." R. Vol. 9, p. 2596.

¹⁹ An additional ground for affirmance was the "public utterance" part of the crime. Although the Jurisdictional Statement, p. 7, attempts to paint a picture of Dr. Levy talking to everyone in his "crowded and busy clinic", the Government after submitting 450 questionnaires to the clinic's 17,500 patients could find only 13 witnesses who heard anything relevant. Although charged with "public utterance", the charge did not require this to find guilt. R. Vol. 9, p. 2594. Dr. Levy mounted no soap box, but the law officer's definition of "public", R. Vol. 9, p. 2596, would render [footnote continued on next page]

The Government's reliance on *Smith v. Whitney*, 116 U.S. 167 (1886), and *Dynes v. Hoover*, 61 U.S. [20 How.] 65 (1858), is of little value. The court of appeals noted that this Court's interpretation of the due process of law has been radically altered since the nineteenth century. See, Jurisdictional Statement Appendix, pp. 30a, 44a-47a. And as Mr. Justice Clark said in *Avrech v. Secretary of the Navy*, *supra*, 477 F.2d at 1242,

the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience. Even the "old soldiers" themselves say that the language in Article 134, judged by the void-for-vagueness cases is 'unduly indefinite.' (Citations omitted.)

The court of appeals began its examination of the articles "mindful of Justice Holmes' sage admonition [*Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)], '[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case of the Fourteenth Amendment to affect it.' Jurisdictional Statement Appendix, p. 22a.²⁰ In addition to the case *sub judice*, the only other cases to address the issues, *Avrech v. Secretary of the Navy*, *supra* (Article 134), and *Hooper v. Laird*, F.2d (D.C. Cir.

[footnote continued from preceding page]

meaningless the right of a military officer to run for public office as guaranteed by A.R. 600-20, para. 42. He can only do so "privately and secretly." *Id.*

²⁰ Mr. Justice Holmes spoke of putting walls between two plots of land. We deal here with criminal statutes, and the "common consent" of the accused or even his possible knowledge of the proscribed speech is beyond ken.

1973) (No. 72-1198, decided August 3, 1973) (Articles 133 and 134), have found that the due process of law overrides historical reticence.²¹

The Government's second substantiality argument is that the decision below "would create a profound disruption of the orderly administration of justice within the military." Jurisdictional Statement, p. 10. But, despite the Government's effort to draw the issue of retroactive application into this case, retroactivity is not an issue here. It seems to argue that despite the unconstitutionality of the statutes, the military must be permitted to enforce them since, if they are unconstitutional, this Court might apply such a holding retroactively and that would cause profound disruption.

Further the argument that "there are substantial areas of misconduct", *id.*, that the military must control but that are not specifically covered by the UCMJ because they were considered covered by Articles 133 and 134 fails to state a substantial argument.²² It is not for this Court to weigh against the Constitution the military's alleged problem with "a substantial and serious gap in

²¹ The three courts of appeals panels which have held Articles 133 and 134 unconstitutional (all three panels considered and struck down Article 134, two of the three considered and struck down Article 133) have done so unanimously. Circuit Judge Seitz joined in the court below's disposition of Articles 133 and 134. Jurisdictional Statement Appendix, p. 84a. The *Hooper* decision was a *per curiam* opinion joined in by Circuit Judge Tamm. Judge Tamm had originally joined in a two member majority which denied *Dr. Levy* an injunction to prevent his trial by court-martial. *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967).

²² As Judge Robinson noted in *Stolte v. Laird*, 353 F. Supp. 1392, 1399, n. 26 (D.D.C. 1972), "... the military is well known for its ability to promulgate detailed regulations on many subjects much less important than the First Amendment."

the military justice system." *Id.* It is fully within the capability of the legislative branch to fill any gaps in the military justice system.

The court of appeals clearly was correct in concluding that the vague articles denied Dr. Levy the due process of law.

III.

THE FREE SPEECH CHARGES VIOLATED THE FIRST AMENDMENT

This appeal should be affirmed because Articles 133 and 134, even if constitutional, were unconstitutionally applied to speech.

The district court found that "the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged . . ." Jurisdictional Statement Appendix, p. 100a. The court of appeals never reached the issue. But, the law officer's charge to the court-martial set forth a *clear and reasonable tendency* test rather than a clear and present danger test. The law officer's charge was that the words should be judged by their "clear and reasonable tendency to promote disloyalty and disaffection." R. Vol. 9, p. 2594.²³

The Government made no attempt to demonstrate military necessity or a rational or a compelling reason for the speech prosecution of Dr. Levy. First amendment incursions require a showing of an ". . . over-

²³ There was no test at all for Additional Charge I, the Article 133 charge on which conviction was had. On the Article 134 charge, the law officer did use the phrase "clear and present danger" in charging a "lesser included offense." R. Vol. 9, p. 2595.

riding and compelling state interest," *DeGregory v. New Hampshire*, 383 U.S. 825 (1966), a military necessity which must be "striking," Warren, *The Bill of Rights and the Military*, 37 *N.Y.U.L. Rev.* 181 (1962), for the amendment "... exacts obedience even during periods of war." *Dennis v. United States*, 341 U.S. 494, 520 (1951) (concurring opinion). There was no finding that at the Fort Jackson, South Carolina, Dermatology Clinic "... an immediate check is required to save the country." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Cohen v. California*, 403 U.S. 15 (1971).

Despite the district court's summary conclusion, there was no finding at the court-martial of a "clear and present danger" of anything, nor were any "harmful effects" shown to have occurred or existed, let alone to have been a crime. To sustain such convictions would go far beyond what was permitted in *Dennis*, and such efforts have been consistently rejected by this Court.

IV.

THE ARTICLE 90 CHARGE SHOULD REMAIN REVERSED REGARDLESS OF THE DISPOSITION OF THE OTHER CHARGES*

The court of appeals noted that the inflammatory evidence most calculated to disturb the court-martial

* If this Court does note probable jurisdiction, Dr. Levy is prepared to argue that the order required him to violate first amendment protected medical ethics. Dr. Levy was convicted for failing to teach his art to combat troops (Special Forces Aidmen) who, unlike medical corpsmen, are not covered by the Geneva Convention and who would have no medical supervision in Viet Nam.
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R. Vol. 19, p. 51; R. Vol. 5, pp. 941-44, 963-69. This directly conflicted with the Oath of Hippocrates. R. Vol. 6, p. 2083. That oath also required Dr. Levy to keep the confidences of his patients. Dr. Levy proved that patients (including military dependents) brought to his clinic were exposed to combat troop-Aidmen without their consent when he was not there to prevent it. R. Vol. 6, p. 1098. And even though Army Regulation 40-554, par. 5, and Technical Bulletin T.B.Med. 230, Treatment and Management of Venereal Disease, 7 July, 1965, §53d(2) prohibits the disclosure of confidential information to non-medical or health agencies, the law officer refused to instruct the court that if it found that Special Forces was not a medical or health agency and the combat troop-Aidmen would have learned the identity of venereal disease contacts then the order was unlawful. R. Vol. 18, App. Exh. 24. Dr. Levy's ethical practice was protected by the first, third, fourth, fifth, and ninth amendments. *Griswold v. Connecticut*, 381 U.S. 479 (1965); especially may he so defend his action, since the proof showed eight or ten combat troop-Aidmen entered an examination room without the consent and over the objections of a disrobed female patient. R. Vol. 6, p. 1098.

The Presumption that the order was lawful, embodied in the Manual for Courts-Martial, para. 169b, p. 321, is a shift of the burden of proof to the accused by the Executive. This Court has not hesitated to strike down such presumptions made by Congress where they violated the Constitution. *Morissette v. United States*, 342 U.S. 246, 275 (1952). *Compare, United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965).

Additionally, the court of appeals decided only that it would not disturb the court's finding that the order was not intended solely to punish. Of course, that was the only defense cognizable under the Manual, par. 169b, p. 321. But Dr. Levy's defense was not limited to the fact that the order was issued at a time when it was known that he would not obey it. R. Vol. 2, pp. 1, 2; R. Vol. 12, App. Exh. 2, p. 10; R. Vol. 13, pp. 540-566; R. Vol. 3, pp. 219-89.

The prosecution of Dr. Levy was selective enforcement, initiated because a Jewish doctor from Brooklyn chose to join a voter registration drive in a small South Carolina county rather than the officers' club. Within two days of his initial off-post off-duty out-of-uniform civil rights activity, someone entered in his G-2 dossier: "Determine whatever [sic] loyalty investigation should be made 19 July 1965." R. Vol. 15, p. 315. A retired special agent of a counter-intelligence corps who lived in that county pushed the investigation, and was extremely interested in Dr. Levy's alleged interest in dating

[footnote continued on next page]

members was introduced under the Articles 133 and 134 charges, and most of this "would have been inadmissible under the Article 90 charge. . . ." Jurisdictional Statement Appendix, p.54a. It said, "We find, with some facility, that Levy was prejudiced by the admission of evidence on the Articles 133 and 134 charges; in any event, there undoubtedly existed a reasonable possibility that he was prejudiced." *Id.*, p. 56a.

The court of appeals said it was left to speculate as to what course the trial might have followed if Dr. Levy had been charged only under Article 90.

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Negroes. R. Vol. 12, pp. 40-41, R. Vol. 14, p. 635. Agent West's reports showed he was far more interested in Dr. Levy's dating habits than in Dr. Levy's statements about voting, the first amendment, or the Constitution. R. Vol. 14, p. 705. The charges were preferred by an officer who feared a "communist" or "pinko" had been let loose in his command. The claim that Dr. Levy spoke "to colored soldiers who were young and immature," (from the Staff Judge Advocate's review) R. Vol. 19, p. 134, "many of whom emotionally and educationally were susceptible to being influenced," (from the Board of Review opinion) *United States v. Levy*, 39 C.M.R. 672 (1968), embodies the assumption that Negro males are childlike. See, G. Myrdal, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, 103 (1944).

Agent West's ideas still cling, for the Government still argues, albeit inaccurately, that the statements were made "to enlisted personnel, most of them black. . . ." Jurisdictional Statement, p. 6. The specialist assigned to Dr. Levy's clinic, a prime prosecution witness, could recall only that Dr. Levy talked to about two Negro patients on one occasion only, out of 17,500 patients. R. Vol. 14, p. 732. And from 450 questionnaires the Government sent to Dr. Levy's patients, only 13 were called as witnesses.

The prosecution was upgraded after the officer who preferred charges was visited by Agent West and provided a G-2 dossier, portions of which have been denied to Dr. Levy and his civilian counsel, but which were provided his military counsel under a mandate of secrecy.

Under such circumstances, we cannot reach the legal conclusion that Captain Levy was not prejudiced by having the court told explicitly that he had called Special Forces personnel "killers of peasants," and "murderers of women and children," had told enlisted men "they should refuse to go to Viet Nam," and had written, "Is Communism worse than a U.S. oriented government? . . . I doubt it." We are unable to reconstruct by hindsight on the basis of reasonable predictability of human behavior, a jurisprudential setting in which a fact-finding panel of military officers could have been immunized, in theory or in fact, from the inflammatory effect of such statements derogating the very military apparatus which the fact-finders were sworn to defend and protect. *Id.*, pp. 57a, 58a.

Indeed to assume that the ten career officers who were Levy's court-martial²⁵ could have been so immunized would run contrary to all we know of human nature.*

The court continued:

This being so, we turn to the teachings of *Kotteakos* [v. *United States*, 328 U.S. 750 (1946)]: "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not

²⁵ All members of the court were career infantry officers ranging in rank from major to colonel; eight were caucasian; eight were Southerners; four had served in Viet Nam, one losing an eye there.

²⁶ The court of appeals noted that the military court followed the law officer's instructions. Jurisdictional Statement Appendix, p. 57a. The dissent argued that this was reason for affirming the Article 90 charge. *Id.*, p. 92a. But one reason this Court reversed in *Kotteakos* v. *United States*, 328 U.S. 750, 767 (1946) was that the trial court itself was confused. If there is any doubt that the law officer was confused as to what the offenses and their elements were one need only read his charge to the court, R. Vol. 9, pp. 2589-2608.

substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765. We are left in grave doubt. *Id.* p. 58a.

The prejudice to Levy was not limited to the placing of his political opinions before the court. The motion for severance was based on the existence of a direct variance in the charges. For example, regarding Charge I, the Article 90 charge, the law officer said at the trial:

LAW OFFICER: If I follow you correctly, the evidence presented on the disobedience of the order in Charge I had nothing to do with the—necessarily, with the other specifications and charges although I think there was—in fact, as I recall the prosecution's testimony on that, the evidence tending to show the disobedience of the order was that Levy said I'm not going to train you and the person went on his way. In other words, it was very short. There was no additional presentation to that individual of the statements concerning our involvement in Viet Nam as I understand it. R. Vol. 5, 891.

But in the pure speech charges, the Government sought to prove that Dr. Levy's statements—allegedly made with a design to promote "disloyalty" and "disaffection"—were made to "divers personnel" which included Special Forces personnel and "everybody to whom the statements were made." *Id.* Allowing the Government to attempt to prove two conflicting fact situations,²⁷ each used to establish a separate crime, was

²⁷ This fact, of course, underscores the contrariness of the whole [footnote continued on next page]

error in light of the motion to sever. *Williams v. United States*, 168 U.S. 382 (1897); *Pointer v. United States*, 151 U.S. 396, 403 (1894).

In his dissent Circuit Judge Seitz resurrected a lower standard, requiring proof that the joinder "substantially prejudiced Captain Levy's constitutional right to a fair trial on the Article 90 charge." Jurisdictional Statement Appendix, p. 85a. However, the correct test is that of *Kotteakos* employed by the majority.²⁸ This Court no longer searches the record for actual prejudice. Rather, it looks first to see if the practice complained of is inherently prejudicial, and if so, the inquiry goes no further. In *Estes v. State of Texas*, 381 U.S. 532, 543 (1965), Mr. Justice Clark expressly said that the Court had rejected the actual prejudice test.

In [*Rideau v. State of Louisiana*, 373 U.S. 723 (1963) and *Turner v. Louisiana*, 379 U.S. 466 (1965)] the Court departed from the approach it charted in *Stroble v. State of California*, 343 U.S. 181 (1952), and in *Irvin v. Dowd*, 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.

The unjustified joinder of unrelated basically dup-

[footnote continued from preceding page]

prosecution. Accused of trying to create "disloyalty" and "disaffection," the Government proved that Dr. Levy—rather than trying to talk to the Aidmen—refused to have anything to do with them.

²⁸ Even the UCMJ requires only that the "error materially prejudices the substantial rights of the accused" to reverse an error of law. Article 59(a) UCMJ, 10 U.S.C. §859(a).

licitous charges²⁰ justifies the reversal for prejudice. See e.g., *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Chapman v. California*, 386 U.S. 18 (1967).

V.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE OF NUMEROUS CONSTITUTIONAL ERRORS IN THE COURT-MARTIAL OF DR. LEVY

Regardless of the correctness of the foregoing arguments, the judgment of the court of appeals should be affirmed because of other constitutional errors. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). These include (a) the failure to disclose to Dr. Levy's civilian and chief counsel the entire G-2 dossier and to permit full cross-examination of the special agent; (b) the failure to disclose to the defense the responses to the 450 questionnaires sent to Dr. Levy's patients; (c) the failure to disclose and to make an adequate check for information obtained by electronic eavesdropping. Additionally, the law officer

²⁰ The Government argues, as if an unconstitutional conviction can somehow be cured by military practice, that reversal of the Article 90 charge would "be to require separate trials on charges that do not arise from the same transaction. That is not the procedure enacted by Congress. . . ." Jurisdictional Statement, p. 16. Of course, as the dissent noted, Rule 8 of the Federal Rules of Criminal Procedure demands severance of non-connected offenses. Jurisdictional Statement Appendix, p. 86a. And the President is to prescribe "[t]he procedure, including modes of proof . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. §836. Despite the Government's argument, Congress has not provided for such joinder.

erred (a) in refusing to apply the "some evidence" test to permit the war crimes defense to go to the court; (b) in refusing to allow truth as a defense to the pure speech charges. Furthermore, the order itself was vague; the specifications were impermissibly vague and overbroad; the Army provided Dr. Levy none of the training it regularly provides other drafted doctors. There were numerous other errors and prejudices to Dr. Levy which arose from trial in the military forum which were raised at trial and thereafter. Included in these are due process and equal protection, right of compulsory process, and effective assistance of counsel questions arising from the following: (1) the career officer "venire" was selected by the general who ordered the court-martial and excluded non-career personnel, enlisted personnel, officers of the rank of captain and below, medical personnel and women and was subject to command influence; (2) the two-thirds verdict and the vote by the court on challenges for cause militate against the exercise of even the peremptory challenge allowed; (3) the same general appointed the investigating officer under Article 32 UCMJ, 10 U.S.C. §832, and the press was excluded from the hearing thereafter held; (4) the failure to grant a change of venue despite the atmosphere at Fort Jackson and the threat to a court member and others; (5) the inside position of the prosecutor (he administers oaths, accommodates the court, qualifies even the defense witnesses, issues even the defense subpoenas, etc.) which creates a "favored" role with the court; (6) the ubiquitous role of the staff judge advocate whose influence pervades the prosecution, and who in this case illegally served as an investigator. Article 6(c), UCMJ, 10 U.S.C. §806(c).

CONCLUSION

For the foregoing reasons, appellee respectfully submits that this Court should dismiss this appeal, or, in the alternative, affirm the judgment entered in this cause by the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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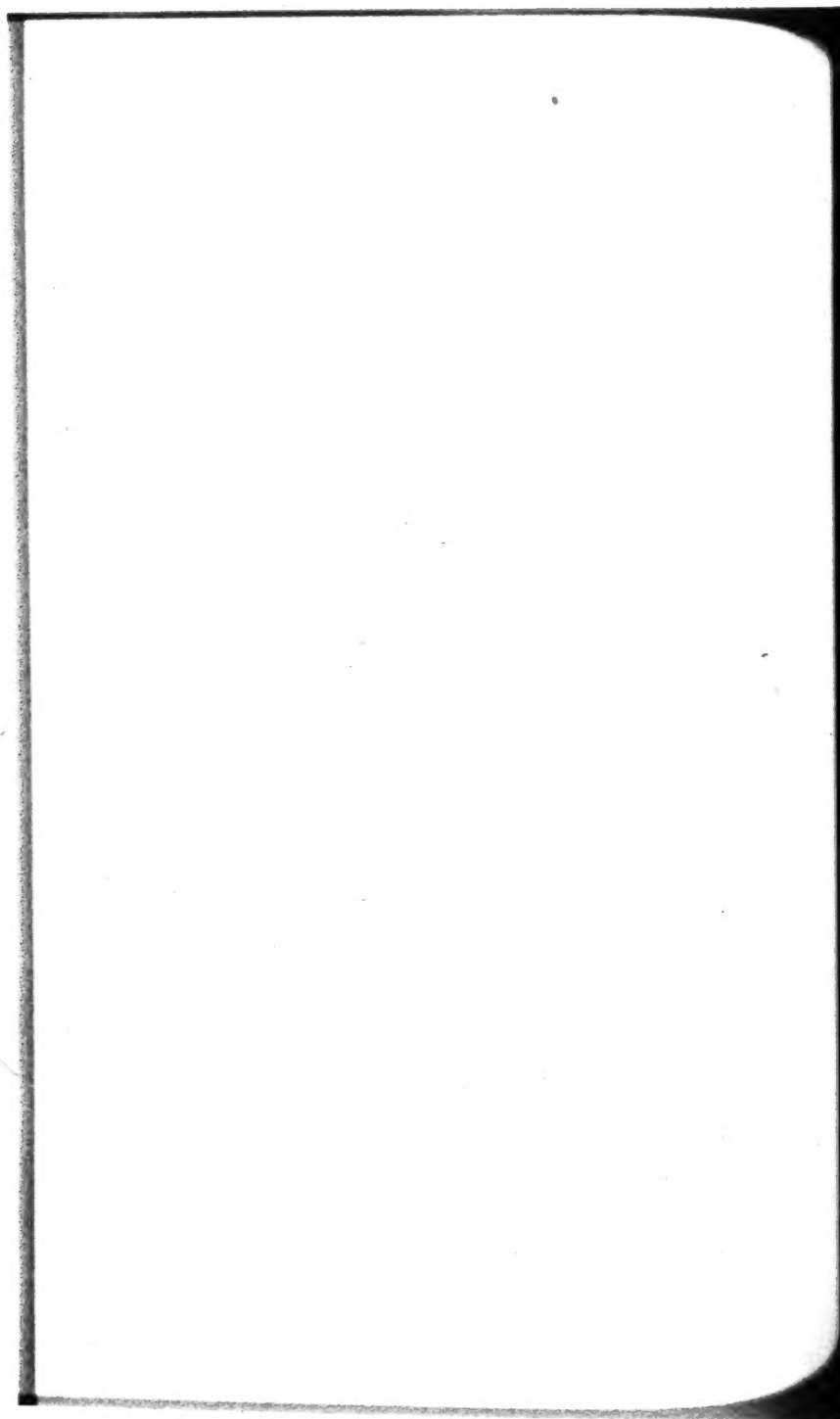
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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States
Penitentiary, Lewisburg, Pennsylvania, and STANLEY
R. RESOR, as Secretary of the Army,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISMISS OR AFFIRM

APPENDIX

CHARGE II: Violation of the Uniform Code of
Military Justice, Article 134

Specification: In that Captain Howard B. Levy, U.S.
Army, Headquarters & Headquarters Company, United
States Army Hospital, Fort Jackson, South Carolina,
did, at Fort Jackson, South Carolina, on or about the
period February 1966 to December 1966, with design to
promote disloyalty and disaffection among the troops,
publicly utter the following statements to divers en-

listed personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces.

ADDITIONAL CHARGE I: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the

United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: "I will not train special forces personnel, because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,' " or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: "I hope when you get to Viet Nam something happens to you and you are injured," or words to that effect; all of which statements were made

to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army.

REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10.

* * * *

2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the time of its entry, and shall specify the statute or statutes under which the appeal to this court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 33, and proof of such service shall be filed with the notice of appeal.

3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of such court. . .

Rule 33.

* * * *

3. Whenever proof of service is required by these rules, it must be stated that all parties required to be served have been served and such service may be shown, either by indorsement on the document served or by separate instrument, by any one of the methods set forth below; and it is not necessary that service on each party required to be served be effected in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, such certificate to be signed by a member of the bar of this court representing the party in behalf of whom such service has been effected. If counsel certifying to such service has not up to that time entered his appearance in this court in respect of the cause in which such service is made, his appearance shall accompany the certificate of service if the same is to be filed in this court.

(c) By an affidavit of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, whenever such service is effected by any person not a member of the bar of this court.

4. Whenever proof of service is required by these rules, it must accompany or be indorsed upon the document in question at the time such document is presented to the clerk for filing. Any document filed with the clerk by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Statutes involved.....	2
Questions presented.....	3
Statement.....	4
Summary of argument.....	16
Argument:	
I. This Court has jurisdiction to hear this appeal.....	21
II. The court of appeals improperly determined the constitutionality of Articles 133 and 134 on their face; it should have determined whether the Articles are unconstitutional as applied.....	26
A. The military officer represents a special tradition and holds unique responsibilities.....	28
B. The fact that certain applications of Article 133 may involve speech that is protected by the First Amendment does not require that the constitutionality of the Article be determined on its face.....	32
III. Articles 133 and 134 are not vague as applied to the conduct involved in this case.....	35
IV. Article 133 is not unconstitutional on its face..	40
A. Article 133 is not unduly vague.....	40
B. Article 133 is not overly broad.....	44
V. In any event, the conviction under Article 90 for the willful disobedience of a lawful order should stand.....	47

Conclusion-----

Page
52

CITATIONS

Cases:

<i>Boyce Motor Lines v. United States</i> , 342 U.S. 337-----	36
<i>Brandenburg v. Ohio</i> , 395 U.S. 444-----	35
<i>Broadrick v. Oklahoma</i> , No. 71-1693, decided June 25, 1973-----	18, 19, 35
<i>Carter v. McClaughry</i> , 183 U.S. 365-----	32, 51
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568-----	35
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611-----	33
<i>Cohen v. California</i> , 403 U.S. 15-----	35
<i>Dash v. Commanding General</i> , 307 F. Supp. 849 affirmed, 429 F. 2d 427-----	46
<i>Dombrowski v. Pfister</i> , 380 U.S. 479-----	32
<i>Dynes v. Hoover</i> , 20 How. 65-----	31
<i>Fletcher v. United States</i> , 26 Ct. Cl. 541, affirmed 148 U.S. 84-----	17, 30, 36
<i>Gooding v. Wilson</i> , 405 U.S. 518-----	35
<i>Hygrade Provision Co. v. Sherman</i> , 266 U.S. 497-----	36
<i>McCulloch, In re</i> , 100 F. 2d 939-----	26
<i>Jordan v. DeGeorge</i> , 341 U.S. 223-----	36, 37
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589-----	33
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415-----	33
<i>Orloft v. Willoughby</i> , 345 U.S. 83-----	28, 30
<i>Quirin, Ex parte</i> , 317 U.S. 1-----	32
<i>Reid v. Covert</i> , 351 U.S. 487, reheard on other grounds, 354 U.S. 1-----	23
<i>Screws v. United States</i> , 325 U.S. 91-----	42
<i>Secretary of the Navy v. Avrech</i> , No. 72-1713, probable jurisdiction noted, October 15, 1973-----	14, 26, 27
<i>Small Company v. American Sugar Refining Company</i> , 267 U.S. 233-----	36

III

Cases—Continued

	Page
<i>Street v. New York</i> , 394 U.S. 576.....	35
<i>Stuart v. Laird</i> , 1 Cranch 299.....	29
<i>Swaim v. United States</i> , 165 U.S. 553.....	32
<i>Toth v. Quarles</i> , 350 U.S. 11.....	28
<i>United States v. Barnett</i> , 376 U.S. 681.....	29
<i>United States v. Batchelor</i> , 7 U.S.C.M.A. 354.....	39
<i>United States v. Frantz</i> , 2 U.S.C.M.A. 161.....	36
<i>United States v. Guest</i> , 383 U.S. 745.....	42
<i>United States v. Holiday</i> , 4 U.S.C.M.A. 454.....	41
<i>United States v. Howe</i> , 17 U.S.C.M.A. 165.....	19,
	29, 30, 40, 41, 47
<i>United States v. Levy</i> , 39 C.M.R. 672.....	4, 7,
	13, 38
<i>United States v. Mouat</i> , 124 U.S. 303.....	28
<i>United States v. National Dairy Products Corp.</i> , 372 U.S. 29.....	34, 36
<i>United States v. Petrillo</i> , 332 U.S. 1.....	34, 36
<i>United States v. Priest</i> , 21 U.S.C.M.A. 564.....	20,
	28, 33, 45, 47
<i>United States v. Wolfson</i> , 36 C.M.R. 722.....	19, 41
<i>United States v. Wurzbach</i> , 280 U.S. 396.....	35
<i>United States Civil Service Commission v. National Association of Letter Carriers</i> , No. 72-634, decided June 25, 1973.....	19, 35
<i>Wainwright v. Stone</i> , No. 73-122, decided November 5, 1973 (<i>per curiam</i>).....	15
Constitution, statutes, and rules:	
United States Constitution:	
First Amendment.....	14,
	17, 18, 20, 27, 28, 32, 33, 34, 44, 45, 47
Fifth Amendment.....	48
Act of August 24, 1937, 50 Stat. 751 <i>et seq.</i> :	
Section 1.....	22
Section 2.....	22, 23
Section 5.....	23

IV

Constitutions, statutes, and rules—Continued

Uniform Code of Military Justice:

Article 90 (10 U.S.C. 890).....	Page 2, 3, 4, 15, 20, 47, 48, 49, 51
Article 133 (10 U.S.C. 933).....	<i>Passim</i>
Article 134 (10 U.S.C. 934).....	<i>Passim</i>
Article 137 (10 U.S.C. 937).....	41
28 U.S.C. 451.....	16, 22
28 U.S.C. 1252.....	16, 21, 22, 24
28 U.S.C. 2103.....	16, 24
28 U.S.C. 1254(2).....	24
50 U.S.C. App. 454.....	4

Rules of the Supreme Court:

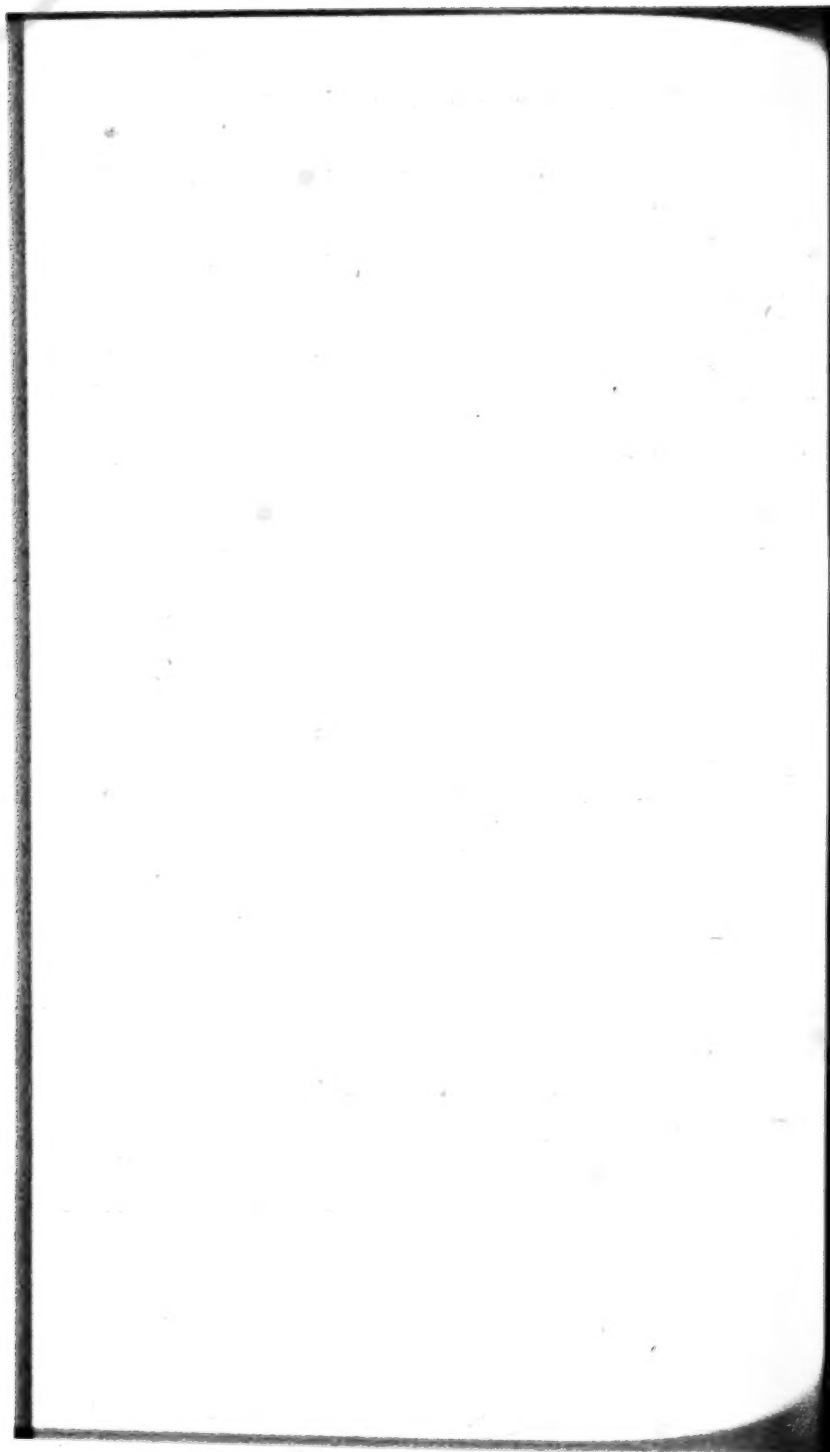
Rule 10.....	25
Rule 33.....	25
Rule 25(a)(d) F.R. App. P.....	25
Rule 41(b) ,F.R. App. P.....	24
Rule 44, F.R. App. P.....	23
Rule 62(g), F.R. Civ. P.....	24
Rule 8, F.R. Crim. P.....	48

Miscellaneous:

AR 350-212 (4).....	41
Barron and Holtzoff <i>Federal Practice and Procedure</i> (1960 ed., revised by Wright), Vol. 1, § 57.....	23-24
British Articles of War of 1765, Article XXIII, Sec. XV.....	29
Emerson, <i>Toward a General Theory of the First Amendment</i> , 72 Yale L.J. 877 (1963) ..	17-18, 33, 39
H.R. 2260, 75th Cong., 1st Sess.....	22
<i>Manual For Courts-Martial</i> (1969).....	14, 18, 19, 38, 40, 41, 42, 44, 48
Moore <i>Manual, Federal Practice And Procedure</i> (1972 ed.).....	23

Miscellaneous—Continued

Notes to Rule 44 of the Advisory Committee of Appellate Rules, 28 U.S.C.A. 209-----	Page 23
Stern and Gressman, <i>Supreme Court Practice</i> , § 2.5 (4th ed.)-----	22
Warren, <i>The Bill of Rights and the Military</i> , 37 N.Y.U.L. Rev. 181 (1962)-----	30
Wiener, <i>Are the General Military Articles Un- constitutionally Vague?</i> , 54 A.B.A.J. 357 (1968)-	30,
	42-43, 46
Winthrop, <i>Military Law and Precedents</i> (2d ed., 1920)-----	29, 30, 41, 47



In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL., APPELLANTS

v.

HOWARD B. LEVY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A) is reported at 478 F. 2d 772. The memorandum opinion of the district court, filed on June 30, 1971 (J.S. App. C), is not reported.

JURISDICTION

Appellee Howard B. Levy filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging his court-martial conviction under Articles 90, 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933 and 934. The district court denied the petition on June 30, 1971, and Levy appealed.

On April 18, 1973, the United States Court of Appeals for the Third Circuit entered a judgment of reversal (J.S. App. B), together with an opinion (J.S. App. A) holding that Articles 133 and 134 are unconstitutionally vague and overly broad and that joint consideration of the Article 90 charge with the charges under Articles 133 and 134 prejudiced Levy's right to a fair trial under Article 90. A notice of appeal to this Court (J.S. App. D) was filed with the court of appeals on May 16, 1973, and the appeal was docketed on July 30, 1973. On October 23, 1973, this Court postponed further consideration of the question of jurisdiction to the hearing on the merit (see Point I, *infra*).

STATUTES INVOLVED

Article 90 of the Uniform Code of Military Justice (10 U.S.C. 890) provides:

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

Article 133 of the Uniform Code of Military Justice (10 U.S.C. 933) provides:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear this appeal.
2. Whether Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, are unconstitutional as applied to the conduct in this case.
3. Whether Articles 133 and 134 are unconstitutional on their face.
4. Whether, assuming that Articles 133 and 134 were properly held unconstitutional, appellee was denied a fair trial on the Article 90 charge, for the direct disobedience of a lawful order, because of the introduction of evidence on charges under the unconstitutional articles.

STATEMENT

On June 2, 1967, appellee Howard B. Levy, then a captain in the United States Army, was convicted by general court-martial of violations of Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933, and 934. Captain Levy, a doctor, had entered the Army under the "Berry Plan" (see 50 U.S.C. App. 454), under which he agreed to serve for two years if permitted first to complete his medical training. See *United States v. Levy*, 39 C.M.R. 672, 675. From the time he entered on active duty in July 1965 until his court martial, Captain Levy was assigned as chief of the dermatology service, U.S. Army Hospital, Fort Jackson, South Carolina.

1. Article 90 provides for punishment of anyone subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer." The specification under Article 90 (Charge I) alleged that Captain Levy willfully disobeyed a colonel's command "to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne)*, 8-R-F16, *Dermatology Training* * * *" (J.S. App. A, p. 2a).

The evidence admitted under this specification showed that one of the functions of the hospital to which Levy was assigned was to train special forces aidmen (Tr. 221-223, 232).¹ Each student was scheduled to spend two hours each day for one week at the

¹ "Tr." refers to the transcript of the court-martial trial, which is part of the record below.

dermatology clinic to receive training in the identification and treatment of certain skin disorders and diseases (Tr. 228, 232). As chief of the dermatology service (and the hospital's only trained dermatologist), Captain Levy had the responsibility to conduct this training (Tr. 227-232). During early 1966 he did so, and continued through the summer, but with increasing irregularity and incompleteness (Tr. 228-230, 527, 541, 556).

In the late summer of 1966, after receiving reports that the dermatological training of the students was unsatisfactory, Colonel Henry Fancy, the hospital commander (Post Surgeon) who was responsible for all medical training conducted in the hospital (Tr. 222-223), told his Plans and Training personnel that he wanted the program carried out (Tr. 229, 230). In early October 1966, Colonel Fancy decided to investigate the problems of the training program in greater detail; he undertook this investigation because of an interview with Agent James West of Military Intelligence regarding a security check of Captain Levy (Tr. 229-231). At the interview with Agent West, Colonel Fancy did not discuss the reports he had received that the dermatological training was unsatisfactory since he was uncertain of their accuracy (Tr. 253).

Colonel Fancy investigated the training program and determined that Captain Levy had totally neglected his duties (Tr. 229-231). He therefore decided to take "relatively strong action" to assure training in basic dermatology (Tr. 231). In his next meeting

with Agent West, Colonel Fancy told him that he planned to order Captain Levy to provide instruction for special forces aidmen (Tr. 254).

On October 11, Colonel Fancy called Captain Levy to his office and personally handed him a written order to conduct the required training (Tr. 231, 232). Colonel Fancy explained that as hospital commander he was ultimately responsible for the program, that Captain Levy was his chief and only dermatologist, and that he expected Levy to teach the aidmen (Tr. 232). Colonel Fancy testified that at the time he gave the order it was his "personal feeling and hope" that Levy would comply (Tr. 244-245; cf. Tr. 524). Colonel Fancy explicitly denied that he gave the order solely to punish Captain Levy for past derelictions (Tr. 245; cf. Tr. 524).²

Upon reading the order, Levy stated that he understood it, but announced that he would not obey it because of his medical ethics (Tr. 232, 233, Pros. Ex. 2). He was told that obedience was nevertheless expected (Tr. 233). Captain Levy persisted in his refusal and refused to have others conduct the training for him (Tr. 528, 529, 532, 545). His enlisted subordinates offered to conduct the necessary training in the derma-

² This account of the discussion between Colonel Fancy and Captain Levy is based upon the testimony of Colonel Fancy. Sergeant Herman Cornell, who worked in the Plans and Training office in the fall of 1966, testified that after returning from a trip on October 12 he discussed training programs with Colonel Fancy, who said that he was quite concerned about the training program and indicated that if he could not get dermatology taught he would have to get permission to omit that portion of the training (Tr. 555; 559-560).

tology clinic, but Captain Levy ordered them not to do so and threatened to punish them if they disobeyed his order (Tr. 531, 537). He was determined that the student aidmen would not receive any training in any area of his responsibility and used his rank as an officer to carry out that determination (see *United States v. Levy, supra*).

Continued efforts by Colonel Fancy to evaluate the progress of the training program following the order of October 11 confirmed that Captain Levy was persisting in his refusal to comply.³ Colonel Fancy delivered to Levy a letter, dated October 14, stating that critiques of the training program would be conducted on October 28 and November 23, 1966 (Tr. 239-241, Pros. Ex. 3). The report following the evaluation on October 28 showed that the training in dermatology was still not being conducted (Tr. 241). On November 4, Colonel Fancy prepared another letter giving Levy the results of the October evaluation and offering any necessary assistance in establishing an adequate program (Tr. 241-242, Pros. Ex. 4).

After the critique of November 23 was conducted, Colonel Fancy reviewed the final evaluation in detail and decided that disciplinary action was necessary (Tr. 256-257). He therefore began preparing an "Article 15" (non-judicial) form of punishment (Tr.

³ After discovering that Captain Levy was not going to train Special Forces aidmen, Colonel Fancy devised what he regarded as a "second-rate" solution to the problem (Tr. 264). He asked the Chief of the Department Hospital Clinics to request that his general doctors, insofar as they could, familiarize aidmen with common skin diseases; he also asked a civilian dermatology consultant to give lectures on a limited basis (Tr. 264-265).

257). Charges under Article 15 were drawn up and sent to the Staff Judge Advocate's Office (Tr. 258-259). Before imposing punishment, however, Colonel Fancy was advised by the intelligence office that he should read the current "G-2 dossier" on Captain Levy (Tr. 259). Colonel Fancy did so. After conferring with legal officers, and in view of information in the dossier suggesting *inter alia*, violations of Articles 133 and 134 of the Code, he terminated the non-judicial punishment proceedings, since he concluded that a court-martial would be more appropriate (Tr. 259-261).

2. Article 134 proscribes, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Article 133 provides for punishment of "conduct unbecoming an officer and a gentleman."

The specification under Article 134 (Charge II) alleged that (App., p. 7):

Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered

* The "G-2 dossier" designates a United States Army Counterintelligence Records Facility file.

to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

The specification under Article 133 (Additional Charge I) alleged that (App., p. 8) Captain Levy

did * * * at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and de-

pendent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,' " or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said

Howard B. Levy was a commissioned officer in the active service of the United States Army.⁵

⁵ There were two additional charges under Articles 133 and 134. The specification under Article 133 (Additional Charge II) alleged that (App. pp. 9-10) Captain Levy

"with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. * * * I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBienPhu'. I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there & would refuse to serve there if I were so assigned. * * *"

"The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. * * *"

"Is Communism worse than a U.S. oriented Government? * * * Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it. * * *"

"Geoffrey who are we fighting for? Do you know? Have you thought about it? You're [sic] real battle is back here in the U.S. but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your [sic] helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same

The evidence under Articles 133 and 134 established that during 1966, while on duty in the dermatology clinic, Captain Levy, upon many occasions, initiated and engaged in conversations, many of them completely onesided, with aidmen undergoing training, patients and visitors. His remarks—as above set forth—were directed to enlisted personnel, many of them black; the court of appeals cited the remarks reproduced under the Article 134 specification

thing with regard to the VietNameese? A dead women is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe—Bull Shit? * * *

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a VietNameese. At least the Viet Cong have that on their side. * * * Geoffrey these people may not be sophisticated (American Style) but their [sic] grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. * * *,"

or words to that effect.

The specification under Article 134 (Additional Charge III) (App., p. 10) alleged that Captain Levy did "advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States" by mailing the same letter to Sergeant Hancock "with intent to interfere with, impair, and influence the loyalty, moral and discipline of the military forces of the United States." (The charges are reprinted in full in the Appendix, pp. 7-11.)

The court martial returned a finding of guilty of a lesser included offense as to these two charges by substituting the phrase "culpable negligence" for the "intent" requirements in both specifications. Prior to sentencing, these charges were dismissed by the law officer on motion of the government on the ground that such findings were tantamount under the UCMJ to an acquittal on those charges (Tr. 2600, 2602, 2616-2621).

(Charge II) as illustrative (J.S. App. A, pp. 3a-4a). These remarks, and many others in a similar vein, were made by Levy, to enlisted personnel, in a crowded and busy clinic that averaged a daily case-load of some 50 to 70 military and civilian patients. *United States v. Levy, supra*, 39 C.M.R. at 674-675.

3. Captain Levy was convicted under Article 90 of willful disobedience of the lawful command of his superior officer. He was also convicted under Articles 133 and 134 of uttering public statements designed to promote disloyalty and disaffection among the troops and, further, of "wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful and disloyal statements" to enlisted personnel. He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor. Levy exhausted his appeals within the military system and sought relief in the federal civilian courts before, during, and after the military proceedings against him (*id.* at 6a-7a).

Levy ultimately filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania.* The petition raised a variety of procedural, evidentiary, and constitutional issues, including the claim that Articles 133 and 134 are unconstitutionally vague. The district court denied the petition in a memorandum opinion and order (J.S. App. C, pp. 98a-104a).

*Levy's confinement was due to expire on August 14, 1969. After Levy filed his petition for habeas corpus, Mr. Justice Douglas on August 2, 1969, released him on bail (396 U.S. 1204).

The court of appeals reversed. In a lengthy opinion, the court first analyzed Articles 133 and 134 (commonly known as the "General Articles") and found them impermissibly vague and lacking in specific standards by which the lawfulness of particular forms of conduct could be measured (J.S. App. A, pp. 1a-97a).⁷ The court recognized that Captain Levy's conduct fell within the explicit description of the ambit of Article 134 contained in the *Manual for Courts-Martial* (1969), which is promulgated by the President by executive order. It stated (J.S. App. A, pp. 45a-46a):

Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense under Article 134, "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With the possible exception of the statement that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children," it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the *Manual*. * * *

The court concluded, however, that the possibility that the provision could be applied to conduct within the area of protected First Amendment expression was sufficient to confer standing on Levy to challenge the potential vagueness of the provisions as they might be

⁷ In a companion case now before this court, *Secretary of the Navy v. Avrech*, No. 72-1713, probable jurisdiction noted October 9, 1973, the government has appealed from a decision by the Court of Appeals for the District of Columbia which also struck down Article 134 on vagueness grounds.

applied to others (*id.* at pp. 45a-47a). The court concluded its discussion of the General Articles by declaring that its decision should be afforded prospective effect, except as to persons who have asserted and preserved the constitutional claim and currently have such a claim pending in the military judicial system or the federal court system (*id.* at p. 51a). See *Wainright v. Stone*, No. 73-122, decided November 5, 1973 (*per curiam*).

The court also overturned Captain Levy's conviction for willful disobedience of a valid order, in violation of Article 90, because it concluded that the joint trial of that charge with the charges under the General Articles created a "reasonable possibility" of prejudice, so that a new trial was required (*id.* at pp. 51a-59a). Chief Judge Seitz dissented from this portion of the court's holding. He stated that the court applied the wrong standard in reviewing the joinder problem—the standard, in his view, should have been one of "substantial prejudice" rather than "reasonable possibility of prejudice"—and that, regardless of the standard, the evidence of Captain Levy's guilt on the Article 90 charge was so overwhelming that habeas corpus relief was inappropriate (*id.* at pp. 84a-95a).

The court of appeals remanded the case to the district court for the issuance of the writ of habeas corpus unless within 90 days the military authorities granted Captain Levy a new trial on the Article 90 charge (J.S. App. B, pp. 96a-97a). The court of appeals subsequently stayed its mandate pending appeal to this Court (App., p. 6).

SUMMARY OF ARGUMENT

I

This Court has jurisdiction under 28 U.S.C. 1252, to hear appeals from judgments of courts of appeals, where an Act of Congress is held unconstitutional in cases where the United States is a party. The appeal statute, Section 1252, expressly authorizes appeal from "any court of the United States" and that term is defined in 28 U.S.C. 451 to include "courts of appeals." Moreover, a reference to the source of Section 1252, the Act of August 24, 1937, substantiates that the phrase "any court of the United States" includes courts of appeals, and that appeals may be taken from those courts to this Court. In any event even if the appeal was improvidently taken, the appeal papers may and should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

Appellee's other jurisdictional contentions, concerning the signing and service of the notice of appeal are frivolous. The notice was signed by an Assistant United States Attorney for the Eastern District of Pennsylvania on behalf of the United States Attorney for that district. This was done because the Third Circuit Court of Appeals, in which the notice was filed, is in the Eastern District of Pennsylvania. As to the contention that the certificate of service filed in the court of appeals, was not signed by a member of this Court, we note that there is no claim that the notice was not served in compliance with the rules of this Court, or that the certificate service did not comply with the rules of the court of appeals in which it was filed.

II

The court below held the General Articles void on their face for vagueness and overbreadth. While we will argue that these holdings are erroneous (*infra*, IV), our first submission is that the court acted improperly in judging the statutes on their face. This contention with respect to Article 134 is made in our brief in *Avrech*; here we consider the court's facial approach to Article 133. We believe that the court should have evaluated that Article in its application to Captain Levy's conduct. If Captain Levy had "fair warning" that his conduct was proscribed by the Article, the Article should have been sustained as applied to him. While this Court on occasion invalidated statutes on their face, without regard to their application to a particular case, where they directly impinge upon First Amendment interests, we submit, for several reasons, that this approach should not be applied to the military Articles.

In the first place the military officer is a presidential appointee of high honor and responsibility. He is part of a specialized society with a history, tradition and disciplinary needs unfamiliar to civilian society and civilian courts. To insure the high character of its officers, the military has punished conduct unbecoming an officer since the founding of the Republic. This Court has long recognized that the traditions of the military give content to the general language of the Article. *United States v. Fletcher*, 148 U.S. 84. Moreover, the recognized necessary restrictions on freedom of speech in the armed services (see Emerson, *Toward*

a *General Theory of the First Amendment*, 72 Yale L.J. 877, 935 (1963)) suggest that civilian courts should not strike down military laws on their face because of an alleged "chilling effect" on First Amendment rights. Finally, facial invalidation is inappropriate where a statute, like Article 133, forbids primarily nonexpressive conduct and has only marginal application to speech. *Broadrick v. Oklahoma*, No. 71-1639, decided June 25, 1973.

III

Articles 133 and 134 are not unduly vague as applied to Captain Levy's conduct. While he was on active duty at an army hospital in Fort Jackson, Captain Levy persistently and openly criticized American involvement in Vietnam in the presence of enlisted men, stating that he would refuse to go if ordered and urging black soldiers to refuse to go to Vietnam and to refuse to fight once there. He characterized special forces personnel as liars, thieves and killers of women and children. The specification of Article 133 additionally charged that he told enlisted men under his supervision that he had refused to obey the commander's order to train special forces aidmen. It is simply inconceivable that Captain Levy would not have known that his conduct was disruptive of good military order and discipline and unbecoming to him as an officer and a gentleman. If he had any doubt, a reference to the *Manual for Courts-Martial*, a definitive publication promulgated by the President, would have quickly told him that his conduct was prohibited.

IV

If contrary to our submission, the General Articles should be judged on their face rather than as applied, we submit that they are neither unduly vague or overly broad. Our discussion of the facial validity of Article 134 is contained in our brief in *Avrech*; and we here consider only Article 133. While the language of Article 133 is general, the military gives specificity to the Article in a number of ways. Military judicial construction has limited the scope of the Article to serious derelictions. *United States v. Wolfson*, 36 C.M.R. 722; *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178. Moreover, the *Manual for Courts-Martial* contains a lengthy discussion and examples of violations of the Article. This articulation of meaning of the general language of Article 133, together with the well-known traditions of the service, is sufficient to overcome any vagueness challenge. Cf. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, No. 72-634, decided June 25, 1973.

Nor is Article 133 overly broad. In terms the Article is not directed at speech at all; it prohibits any actions that are unbecoming to an officer and a gentleman. Speech related activities are only a small portion of the Article's coverage. In these circumstances, the Article is not overly broad. *Broadrick v. Oklahoma*, *supra*. To the extent that the Article restricts speech it does so properly. The rights of speech in the military are necessarily more limited than those in civilian society. The special responsibilities of a military officer

require that he, even more than an enlisted man, exercise good judgment in his expressive activities. The free and open debate which is vital for a civilian society could undermine civilian control of the military, if engaged in by ranking military officers. Given these necessary limitations on freedom of speech in the military, to the extent that Article 133 forbids speech which "undermine[s] the effectiveness of response to command" (*United States v. Priest*, 21 U.S.C.M.A. 564, 570), it does not offend the First Amendment.

V

Even assuming that the General Articles are unconstitutional, the conviction under Article 90 for willful disobedience of a lawful order should stand. The court below held that Captain Levy had been denied a fair trial on the Article 90 charge by reason of its joint trial with the Article 133 and 134 charges. In the first place the court applied an incorrect standard in reviewing that conviction. The standard should not have been whether the joint trial created "a reasonable possibility of prejudice," but whether the joinder "substantially prejudiced" Captain Levy's right to a fair trial under the Article 90 charge.

In fact Captain Levy was not prejudiced at all by the joint trial. His principal defense was that the order, which he concededly disobeyed, was illegal because it was motivated solely by a desire to increase the possible punishment. However, the evidence that this was not his commander's primary motivation was overwhelming. Moreover, much of the allegedly prejudicial material of which Captain Levy now com-

plaintains was brought out by Levy himself in his attempt to establish his commander's unlawful motivation.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

On October 23, 1973, this Court postponed further consideration of the question of jurisdiction to the hearing on the merits. Accordingly, we shall first show that the case is properly before the Court.

In his Motion to Dismiss or Affirm, Levy raised two jurisdictional questions. He questioned (Motion to Dismiss or Affirm, p. 7, n. 11) whether an appeal from the court of appeals to this Court would lie under 28 U.S.C. 1252. He also argued (Motion to Dismiss or Affirm, pp. 5-7), that the appeal should be dismissed because the notice of appeal was not properly filed or served.

1. 28 U.S.C. 1252 provides in pertinent part that: "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of *any court of the United States*, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. * * *

(Emphasis supplied.) Levy argues that the unqualified language allowing such appeals from decisions of "any

court of the United States" should be interpreted to permit appeals only from district court decisions and that accordingly the government should have proceeded by certiorari rather than by appeal. There is no indication, however, that Congress did not intend this broad phrase to mean what it says. "Any" court of the United States includes courts of appeals as well as district courts. "[T]he Reviser's Notes, which specifically mention courts of appeals, indicate that the language of the Section was deliberately chosen so as to allow appeals from any federal court decisions holding federal laws invalid." Stern and Gressman, *Supreme Court Practice* (4th ed.) § 2.5, p. 31, n. 3. The Reviser's reference to courts of appeals is supported by the definitional section, 28 U.S.C. 451:

As used in this title: The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts * * *.

The conclusion that Section 1252 covers appeals from courts of appeals is confirmed by its legislative history. Section 1252 originated as Section 2 of the Act of August 24, 1937, (50 Stat. 751, 752, H.R. 2260, 75th Cong., 1st Sess.). That Act, in Section 1, required "any court of the United States" to notify the Attorney General of any case between private litigants in which the constitutionality of an Act of Congress was drawn into question, and to permit the United States to intervene in any such proceedings. Section 2 authorized appeal from "any court of the United States" to the Supreme Court in any proceedings "to which the United States * * * is a party

* * * and in which the decision is against the constitutionality of any Act of Congress * * *." Section 5, in close juxtaposition to Section 2, defined the term "court of the United States" to include any "circuit court of appeals." That the notification, intervention and appeal process was intended to apply to the court of appeals, if the constitutional question or adverse ruling first occurred at that level, is confirmed by Rule 44 of the Federal Rules of Appellate Procedure, which prescribes the mechanism for notifying the Attorney General of constitutional questions arising in the court of appeals.* If the intervention to enable the Attorney General to defend the constitutionality of the federal statute may take place in that court, so may an appeal from its decision holding the Act unconstitutional.

This Court observed in *Reid v. Covert*, 351 U.S. 487, 490, reheard on other grounds, 354 U.S. 1, " * * * it would do violence to the purpose of Congress to provide a 'prompt review of the constitutionality of federal acts,' *Fleming v. Rhodes*, 331 U.S. 100, 104, to interpret § 1252 restrictively." It is clear therefore that "appeals from the courts of appeals to the Supreme Court are * * * authorized by 28 USC § 1252," Moore, *Manual Federal Practice and Procedure* (1972 ed.), p. 2106. See also Barron and Holtzoff, *Federal*

*The Notes to Rule 44 of the Advisory Committee of Appellate Rules state: "[This rule] is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule."

Practice and Procedure (1960 ed., revised by Wright), Vol. 1, § 57.*

At all events, even assuming that Section 1252 does not authorize an appeal from a court of appeals, "this alone shall not be ground for dismissal." 28 U.S.C. 2103. That Section provides that where an appeal is improvidently taken from a court of appeals, when certiorari should have been sought, "the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken." If an appeal under Section 1252 does not lie to this Court, then this Court should treat the papers as a petition for certiorari and grant the petition.

2. Levy has also moved to dismiss the appeal on the grounds that the government attorney who filed the notice of appeal to this Court in the Third Circuit Court of Appeals was not counsel of record and never entered an appearance, and that the person certifying service of the notice of appeal is not a member of the bar of this Court (Motion to Dismiss or Affirm, pp. 5-8). These contentions are frivolous.

* Levy's argument that, since Rule 41(b) of the Federal Rules of Appellate Procedure does not explicitly empower a court of appeals to stay its mandate pending appeal to this Court, "there can be no such appeals" (Motion to Dismiss or Affirm, p. 7, n. 11) is illogical. Whatever may be said about appeals under Section 1252, the rules explicitly provide for appeals from courts of appeals in some circumstances. 28 U.S.C. 1254(2). The proper inference to be drawn from these provisions is only that, since appeals to this Court may be taken from courts of appeals, those courts have power to grant stays pending such appeals. Cf. Rule 62(g), Fed. R. Civ. P.

In regard to Levy's assertion that the notice of appeal was filed and certified by "legal strangers" to the litigation, the names appearing on the government's notice of appeal are Robert E. J. Curran, United States Attorney for the Eastern District of Pennsylvania and Carmen C. Nasuti, an Assistant United States Attorney in that office (J.S. App. D, p. 105a). Service of the notice was certified by Nasuti (J.S. App. D, p. 106a). This case was handled in the lower courts by the United States Attorney's Office for the Middle District of Pennsylvania. For reasons of geographical convenience, the government attorneys in the Eastern District, where the court of appeals is situated, were asked by government counsel of record to file and serve the notice of appeal to this Court. Levy does not contend that this procedure deprived him of actual notice of the government appeal.

The claim that this Court is without jurisdiction because the person certifying service of the notice of appeal is not a member of this Court is equally insubstantial. Rule 10 of the Rules of this Court requires that the notice of appeal be filed with the clerk of the court of appeals and served on all parties "in the manner prescribed by Rule 33 [of the Rules of this Court]." There is no suggestion that the "manner" of service did not comply with Rule 33 of the Rules of this Court and there is no suggestion that the filing of the notice and certificate of service in the Third Circuit did not comply with the rules governing that court. See Rule 25(a), (d), Fed. R. App. P. In any event, such technical non-compliance, if any, with this Court's Rules concerning the form of proof of service is

not a jurisdictional defect warranting dismissal of the appeal. See, *In re McCulloch*, 100 F. 2d 939 (C.A. 7). Like Levy's contention concerning the alleged deficiency in the signing of the notice of appeal, Levy suffered no prejudice from any defect in the certificate of service.

II

THE COURT OF APPEALS IMPROPERLY DETERMINED THE CONSTITUTIONALITY OF ARTICLES 133 AND 134 ON THEIR FACE; IT SHOULD HAVE DETERMINED WHETHER THE ARTICLES ARE UNCONSTITUTIONAL AS APPLIED

The court of appeals held Articles 133 and 134 (referred to together as the "General Articles") void on their face for vagueness and overbreadth. In our brief in *Secretary of the Navy v. Avrech*, No. 72-1713," we argued that the court of appeals improperly judged the validity of Article 134 on its face, rather than as applied. Much of what we said in that brief applies to our contention here that the court below improperly assessed Article 133, as well as Article 134, on its face, rather than as applied to Captain Levy's conduct. We therefore refer the Court to that discussion, which supplements our arguments below." In evaluating the General Articles on their face, we will focus principally upon Article 133, although we will necessarily summarize some of what we said in *Avrech*, because of the close relationship of the General Articles.

¹⁰ On October 23, 1973, the Court ordered that argument on the merits in this case would be in tandem with the argument of *Avrech*.

¹¹ We are serving a copy of our *Avrech* brief upon appellee.

As with the court of appeals in *Avrech*, we submit that the court below took the wrong approach in evaluating the constitutionality of Articles 133 and 134. Instead of considering the validity of the provisions as an abstract matter on the basis of hypothetical applications of the General Articles, it should have evaluated their application in this particular case. We believe, and argue below, that Captain Levy was completely aware that his declarations to enlisted personnel, such as "I would refuse to go to Vietnam if ordered to do. * * * If I were a colored soldier I would refuse to go to Vietnam and if I were a colored soldier and were sent to Vietnam I would refuse to fight," were both unbecoming to him as an officer and plainly prejudicial to good military order and discipline. If so, that should have been the end of the matter as far as a civilian reviewing court is concerned. There was no occasion for the court of appeals to strike down Levy's conviction because of its conclusion that in other situations or applications the Articles might not give adequate notice to those charged with violating them. Similarly, if the provisions are constitutional as applied to Levy, there was no reason for the court below to invalidate the Articles for overbreadth on the basis of problems that might arise in their possible application in other situations not before the court.

While this Court, on occasion, has struck down statutes on their face because of their "chilling effect" on the exercise of First Amendment rights, we submit that rationale is not appropriate in determining the constitutionality of the Articles which govern the conduct of members of armed forces. While military of-

ficers have a constitutionally protected right of free speech, the special character of the military community and the special responsibilities of military officers require a different approach in determining how the First Amendment guarantees are to be applied to them. To develop this analysis, it is necessary first to describe the unique character of the military community (see U.S. Br. in *Avrech*, pp. 13-18) and the particular role played by officers (*infra*, A).

A. THE MILITARY OFFICER REPRESENTS A SPECIAL TRADITION AND
HOLDS UNIQUE RESPONSIBILITIES

A military officer is a governmental appointee of special honor and responsibility. He receives his commission from the President of the United States. *United States v. Mouat*, 124 U.S. 303. "The President's commission * * * recites that 'resposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to a specified rank during the pleasure of the President." *Orloff v. Willoughby*, 345 U.S. 83, 91.

The officer holds a position of responsibility and command in the armed forces, whose central mission is "to fight or be ready to fight wars." *Toth v. Quarles*, 350 U.S. 11, 17. He may hold the awesome responsibility to "commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself." *United States v. Priest*, 21 U.S. C.M.A. 564, 570.

Because officers may carry great responsibilities, the military has historically required an especially high standard of conduct for them. In 1775 the Continental Congress adopted for its army, *in haec verba*,

Article XXIII of Section XV of the British Articles of War of 1765:

Whatsoever commissioned officer shall be convicted before a General Court-martial, of behaving in a scandalous, infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from [the] Service.¹²

This Article was reenacted in 1776. In 1786 the provision was enacted again, with no change in text.

The scope of the Article was enlarged in the Articles of War of 1806 which, omitting the terms "scandalous" and "infamous," provided that "[a]ny commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service." Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 983. The effect of the revision was to broaden the scope of the Article and "thus * * * to establish a higher standard of character and conduct for officers of the army." Winthrop, *supra*, pp. 710-711.¹³ These early enactments of Article 133 are indicative of its conformity of contemporary understanding of accepted standards of conduct for military officers. Cf. *United States v. Barnett*, 376 U.S. 681, 693; *Stuart v. Laird*, 1 Cranch 299, 309. See *United States v. Howe*, 17 U.S.C.M.A. 165, 174. The Article has remained basically un-

¹² Winthrop, *Military Law and Precedents* (2d ed., 1920), pp. 945, 957. Bracketed material indicates a change in the American Article.

¹³ "At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should not be slight but of a material and pronounced character." Winthrop, *supra*, p. 711.

changed through various reenactments since 1806, until enacted as Article 133 in 1951.¹⁴

As we discussed on our brief in *Avrech* (pp. 17-18), civilian courts have long "supported the military establishment's broad power to deal with its own personnel," Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962), and this Court has explicitly refused to interfere with the military's appointment of officers. *Orloff v. Willoughby*, 345 U.S. 83.

In *United States v. Fletcher*, 148 U.S. 84, decided in the last century, this Court recognized the special competence of the military to assess conduct unbecoming an officer. The Court rejected Captain Fletcher's argument that the court martial could not properly have held that his refusal to pay a just debt was conduct unbecoming an officer. 148 U.S. at 91-92. The Court's brief discussion of the subject followed the reasoning of Judge Nott in the Court of Claims decision in the same case (*Fletcher v. United States*, 26 Ct. Cl. 541), which stressed the "higher code termed honor" of military officers and the unfamiliarity of civilian courts with military standards of conduct (26 Ct. Cl. 562-563):

It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by

¹⁴ The legislative background is documented in Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 358 (1968); see also Winthrop, *supra*, p. 710. Over the years the Article has been made to apply to "cadets" and "midshipmen" as well as officers, and the mandatory punishment of dismissal has been eliminated. See *United States v. Howe*, *supra*, 17. U.S.C.M.A. at 176.

refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, "His moral horizon was limited by the civil code of Tennessee." * * * We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum*; but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum*. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. * * *

Both Articles 133 and 134 are stated in general terms, and have acquired their meaning by military custom and experience. Thus the early cases, cited in our brief in *Avrech* (pp. 15-17), are pertinent here. For example, in *Dynes v. Hoover*, 20 How. 65, the Court observed that any uncertainty a civilian court might have about the meaning of the predecessor of Article 134 was overcome by the practical understanding of men trained in the customs of the services (20 How. at 82):

Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by the practical men in the navy and army, and by those who have

studied the law of courts martial, and the offences of which the different courts martial have cognizance. * * *

See, similarly, *Swaish v. United States*, 165 U.S. 553, 561-562; *Carter v. McClaughry*, 183 U.S. 365, 386-387, 390, 400-401. Cf. *Ex parte Quirin*, 317 U.S. 1, 29-31, 35.

While these cases are old, their observations are pertinent to the military today. The armed forces still need flexible and effective power to enforce the "higher code termed honor" of its officers and to maintain discipline and to punish conduct of any serviceman prejudicial to good order. And it is still true today that any superficial appearance of vagueness in the General Articles is eliminated when they are interpreted, as they must be, in the light of military custom and experience.

B. THE FACT THAT CERTAIN APPLICATIONS OF ARTICLE 133 MAY INVOLVE SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT DOES NOT REQUIRE THAT THE CONSTITUTIONALITY OF THE ARTICLE BE DETERMINED ON ITS FACE.

As we discuss at greater length in our brief in *Avrech* (pp. 18-19), the traditional rule of constitutional adjudication would not allow a person whose own conduct could constitutionally be regulated by a statute to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others. However, when First Amendment freedoms are at stake, this Court has relaxed traditional rules of standing to permit attack on overbroad statutes by persons whose "hardcore" conduct was clearly proscribed. See *Dombrowski v. Pfister*, 380 U.S. 479,

486; *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433; *Coates v. City of Cincinnati*, 402 U.S. 611; *Keyishian v. Board of Regents*, 385 U.S. 589. The reason for this relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise by others of their First Amendment rights.

This principle should not be applied in considering constitutional challenges to the Articles which govern the conduct of military officers and personnel. Unlike civilian society, where the individual is largely left alone by the State and is required only to avoid transgressing well-defined prohibitions, members of the armed forces are required affirmatively to meet certain standards of conduct established largely by tradition and developed in the light of the particular requirements of the military. These obligations are even greater for military officers, commensurate with their greater responsibilities.

As we noted in our brief in *Avrech* (pp. 19-20), the rights of speech of servicemen, while protected by the First Amendment, must in some ways be more limited than those of civilians. As Professor Emerson has stated (*Emerson, Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 935 (1963)): "To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression." The necessity for these limitations on freedom of speech were explicated in a passage from *United States v. Priest*, *supra*, 21 U.S.C.M.A. at 570, quoted in our *Avrech* brief (p. 20): essentially

speech must be limited which has a clear tendency to "undermine the effectiveness of response to command."

It follows, we believe, that as long as Article 133 put Captain Levy on notice that it prohibited his conduct, it was improper for the court below to strike it down because of its alleged chilling effect upon the possible exercise of First Amendment rights of other officers in other situations. Article 133 helps the services insure a high standard of character and honor among its officers. It could not continue adequately to perform that office if its validity were tested not on the basis of its application to particular cases, but in relation to every hypothetical situation that could be imagined.

It is a settled principle of constitutional adjudication that "statutes are not ordinarily invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States v. National Dairy Corp.*, 372 U.S. 29, 32). This principle is of special importance in considering statutes governing conduct of military officers. It counsels that the civilian courts should not strike down a long-established and traditional military law because of uncertainty of the validity of its possible application to hypothetical and conjectural situations not involved in the actual case before the court.

This Court, moreover, has been reluctant to declare a statute void on its face when there exists a substantial class of situations to which the statute may be validly applied. See, *e.g.*, *United States v. Petrillo*,

332 U.S. 1, 17; *United States v. Wurzbach*, 280 U.S. 396, 399. Even if a statute is defective in regard to marginal applications, facial invalidation is inappropriate if the "remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct." *United States Civil Service Commission v. National Association of Letter Carriers*, No. 72-634, decided June 25, 1973 (slip op. 31).

Moreover, facial invalidation has been principally applied to statutes which seek to regulate "only spoken words." *Gooding v. Wilson*, 405 U.S. 518, 520. See *Cohen v. California*, 403 U.S. 15; *Street v. New York*, 394 U.S. 576; *Brandenburg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568. The Court observed in *Broadrick v. Oklahoma*, No. 71-1693, decided June 25, 1973 (slip op. 14) that, "particularly where conduct and not merely speech is involved," facial invalidation is inappropriate unless the overbreadth is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." As we show below (pp. 40-47), Article 133 does not principally apply to speech and there is "a whole range of easily identifiable and constitutionally proscribeable * * * conduct" (*Letter Carriers, supra*) that it covers.

III

ARTICLES 133 AND 134 ARE NOT VAGUE AS APPLIED TO THE CONDUCT INVOLVED IN THIS CASE

The test for determining whether a statute is impermissibly vague is whether it "conveys sufficiently definite warnings as to proscribed conduct when

measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-232; *Small Company v. American Sugar Refining Company*, 267 U.S. 233, 241-242; see *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502; *Boyce Motor Lines v. United States*, 342 U.S. 337, 340-341; *United States v. Petrillo*, 332 U.S. 1, 8. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed" (*United States v. National Dairy Corp.*, *supra*, 372 U.S. at 32-33).

Article 133, as well as Article 134, must be judged " * * * not in vacuo, but in the context in which the years have placed it" (*United States v. Frantz*, 2 U.S.C.M.A. 161, 163). So viewed they provided adequate notice to Captain Levy that they prohibited the conduct in which he engaged. Preliminarily, however, it is useful to recall that the "common understanding and practices" (*Jordan, supra*) in which the application Articles are to be judged are those of the military.

We have already noted that a military officer may carry the responsibilities, literally, of the life and death of the men in his command. It would be not practicable nor wise to codify totally the obligations of officers. The circumstances in which an officer is expected to use his good judgment are too protean to be encapsulated in an exclusive listing. As Judge Nott said (*Fletcher v. United States*, 26 Ct. Cl. 541, 563, affirmed, 148 U.S. 84), "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable

that the standard of the Army shall come down to the requirements of a criminal code." In the light of the "common understanding and practices" (*Jordan, supra*) of military officers Captain Levy had adequate notice that the General Articles forbade his conduct.

As the specifications under both Articles alleged, while stationed at the Army Hospital at Fort Jackson, Captain Levy persistently and openly criticized American involvement in Vietnam, stated that he would refuse to go there if ordered and urged that black soldiers refuse to go to Vietnam if ordered or to fight once there. Another common theme in Captain Levy's statements was that Special Forces personnel were liars, thieves and killers of women and children. The specification under Article 133 additionally alleged statements by Captain Levy, to enlisted personnel under his supervision, that he refused to obey the Hospital Commander's order to train Special Forces aidmen.

Captain Levy made these statements over a period of months, with complete disregard as to time and place, in a busy hospital clinic with civilian and military patients. The statements were directed to Levy's enlisted subordinates, and especially to black personnel, who might have been particularly susceptible to Captain Levy's arguments linking American involvement in Vietnam with racial suppression in the United States. Captain Levy did not make his statements "behind closed doors but wherever and whenever the occasion presented a likely prospect in which a seed of thought could be planted and for all to hear. Certainly, these utterances were 'Publicly' made."

United States v. Levy, supra, 39 C.M.R. at 678. The statements were volunteered and made under circumstances where open and extensive circulation was guaranteed by virtue of the speaker's rank and position.

It should have been clear to anyone of ordinary intelligence that such behavior was prohibited under Article 134 as "directly and palpably" to the prejudice of good order and discipline. Had Captain Levy desired to evaluate the lawfulness of his conduct, reference to the *Manual* would have resolved any doubts he might have entertained simply from a reading of the statutory provisions he now attacks. The section in the *Manual* outlining types of conduct violative of Article 134 includes a discussion of "disloyal statements undermining discipline and loyalty" (§ 213f (5)). As examples of such misconduct, the *Manual* mentions "utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States * * *." The same conduct is listed as violative of Article 134 in the Table of Maximum Punishments (§ 127c) and in the forms for Charges and Specifications (App. 6c).

As the court of appeals observed (J.S. App. A, p. 46a), "[w]ith the possible exception of the statement that 'Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' it would appear that each statement for which [Captain Levy] was court-martialed could fall within the example given in the *Manual*." The specification's requirement that the statement be "designed to promote disloyalty or disaffection" was

obviously satisfied in this case. The content of the statements and the circumstances under which they were delivered established Captain Levy's intent.¹³

Nor could any commissioned officer of ordinary intelligence—and *a fortiori* a man as highly educated as Captain Levy—have failed to perceive that such behavior was prohibited by Article 133 as “conduct unbecoming an officer and a gentleman.” The evidence relating to the Article 134 offense is relevant to show a violation of Article 133. Also significant is the additional statement by Captain Levy alleged in the Article 133 specification: “The Hospital Commander has given me an order to train special forces personnel, which order

¹³To prove guilt under the Article 134 specification, the government had to prove beyond a reasonable doubt that the statements were designed to promote disloyalty and disaffection among the troops; that the statements were disloyal to the United States; that the statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops (actual success in indoctrinating a particular audience is not a required element of proof, *United States v. Batchelor*, 7 U.S.C.M.A. 354); and that the conduct of the accused was “directly and palpably” prejudicial to good order and discipline in the Armed Forces.

Appellee argues (Motion to Dismiss or Affirm, pp. 18-19) that the standard instruction employed in this case—that the statements must have a “clear and reasonable tendency” to promote disloyalty and disaffection—was invalid under the First Amendment and should have been replaced by a “clear and present danger” test. Whatever the merits of this argument with respect to the regulation of speech by civilians, surely the “clear and reasonable tendency” test used here, when combined with the additional requirements outlined above, is sufficient to pass constitutional muster with respect to regulation of active members of the Armed Forces acting within the military setting. Cf. Emerson, *Toward a General Theory of the First Amendment*, *supra*, 72 Yale L.J. at 935-937; *United States v. Voorhees*, 4 U.S.C.M.A. 509.

I have refused and will not obey." Captain Levy did not simply disobey a lawful order; he made a special point of telling his enlisted subordinates what he had done. Such conduct, judged in light of military practice and tradition, clearly exceeded the "limit of [conduct] below which the individual standards of an officer * * * cannot fall without seriously compromising his standing as an officer * * * or his character as a gentleman" (*Manual*, ¶ 212). See *United States v. Howe*, 17 U.S.C.M.A. 165.

IV

ARTICLE 133 IS NOT UNCONSTITUTIONAL ON ITS FACE

If, contrary to our submission, the Court should conclude that the constitutionality of the General Articles should be determined on their face rather than as applied, then we submit that they are neither unduly vague or overbroad. Since we considered the facial validity of Article 134 in our brief in *Avreck* (pp. 27-38), we will here focus on Article 133.

A. ARTICLE 133 IS NOT UNDULY VAGUE

As we explained above, Article 133 is designed to ensure a high standard of conduct of military officers. Its content must be determined by reference to the well-settled traditions and customs of the military. To military officers, it sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague.

1. Article 133 has been strictly construed to cover only conduct that violates recognized standards of military behavior. As Article 134 has been interpreted to

reach only conduct "directly and palpably" prejudicial to good order, *United States v. Holiday*, 4 U.S.C.M.A. 454, 456, so Article 133 has been limited to serious derelictions. *United States v. Wolfson*, 36 C.M.R. 722; *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178 (holding that Article 133 is not unconstitutionally vague).¹⁶ The same restriction is noted in Winthrop, *Military Law and Precedents*, *supra*, pp. 711-712:

Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents [footnotes omitted].

A further assurance of "fair warning" is provided by the regular instruction in the Uniform Code of Military Justice which is given to all officers. AR 350-212 (4); cf. 10 U.S.C. 937, Article 137 UCMJ; see our brief in *Avrech*, p. 26).

2. As with Article 134, the *Manual for Courts-Martial* is an important source of guidance for officers as to the requirements of Article 133. AR 350-212(4) requires the officers under a training course in military justice which gives them a thorough exposure to the

¹⁶ The court below (J.S. App. A., p. 23a) stated that it was aware of no decision by the Court of Military Appeals which dealt with the vagueness of Article 133. The court in *Howe* specifically rejected a challenge to Article 133 on the ground of vagueness. 17 U.S.C.M.A. at 176.

Manual. The discussion of Article 133 in the *Manual* (§ 212) gives a number of examples of conduct which will be, and in the past has been found violative of Article 133. While that discussion does not specifically mention conduct such as Captain Levy's, it does warn that "[t]his article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer * * *" (*Manual*, §212). Disloyal statements, as we note in our brief in *Avrech* (p. 29), are specifically prohibited under Article 134.

3. Article 133 is given further definitiveness by the practical requirement that no officer can be convicted thereunder except for conduct that any reasonable officer would know was wrong. Although Article 133 does not in terms require *mens rea*, convictions are practically always for knowing violations of law. Cf. Wiener, *Are the General Military Articles Unconstitutionally Vague?*, *supra*, 54 A.B.A.J. at 364. The specification under Article 133 charges Captain Levy with conduct that he must have known was not permissible activity by an officer in the United States Army. Cf. *United States v. Guest*, 383 U.S. 745, 753-754, 775-786 (holding that a scienter requirement can save a criminal statute from unconstitutional vagueness; *Screws v. United States*, 325 U.S. 91).

4. Given the fact that the armed forces properly require high standards of conduct by its officers, it is fair to ask how, as a practical matter, the scope of Article 133's prohibition could be delineated more clearly than it presently is by the statute itself, the underlying military traditions, the *Manual* and the cases construing its provisions. Wiener, *Are the Gen-*

eral Military Articles Unconstitutionally Vague?, *supra*, 54 A.B.A.J. at 363, puts the question as follows:

[I]t may well be asked how, as a matter of legislative draftsmanship, Congress could effectively proclaim its intent to hold commissioned officers to "a higher code termed honor" lest the standard of the armed forces "come down to the requirements of a criminal code."

What is involved here is a system of values which has been part of the military experience for centuries. While these values are communicated to officers through military customs and usage, and by example, they cannot be exhaustively codified without bringing the standard of conduct expected of officers "down to the requirements of a criminal code."

The decision below, striking down on vagueness grounds the prohibition against "conduct unbecoming an officer and a gentleman," in effect means that the military cannot hold its officers to their traditional high standards of conduct. We submit that the court below did not adequately weigh this Court's early decisions holding that the superficial appearance of vagueness is overcome by military custom and experience—and that at times it disregarded the differences between the civilian and military environments and between military officers and civilian citizens.

The General Articles are not addressed to a civilian society with widely varying subcultures and diverse mores. Rather, these articles are addressed to the specialized military community, which exists for special

purposes. It is a community, moreover, whose practices and traditions, widely known not only within the military but outside as well, have remained substantially intact for centuries. When Article 133 speaks of "conduct unbecoming an officer and a gentleman," it addresses the common understanding of an officer in the performance of his duties. When the court of appeals asks the rhetorical question, "In a society witnessing rapidly changing manners and mores, against what existing standard is gentlemanly conduct to be measured?" (J.S. App. A, p. 42a), it misses the point. There may be no agreed standard of conduct in civilian society, but the traditions, practices and obvious organizational needs of the armed forces provide a clear and commonly understood standard for the military.

B. ARTICLE 133 IS NOT OVERLY BROAD

Article 133 is not in terms directed at speech at all; it prohibits "conduct unbecoming an officer and a gentleman * * *." As shown by the discussion in the *Manual* of the various offenses under that Article (see ¶ 212), in most of its applications Article 133 does not deal with speech-related activities but with conduct that implicates no First Amendment interests. There are only a few instances in which the conduct unbecoming an officer described in the *Manual* relates to speech.

As we have noted (see *supra*, pp. 32-33), it is only with respect to statutes that have a chilling effect upon the exercise of First Amendment rights that this Court has invalidated legislation on its face for over-

breadth, without regard to its impact in the particular case. The alleged overbreadth of Article 133 therefore must be determined not with respect to the probable applications of the Article to the broad gamut of conduct which it covers, but only to the narrower areas in which it operates to penalize speech-related activities.

Article 133 "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman" (*Manual*, 1212). The Article thereby requires officers to live, at least, up to the standards of enlisted men with respect to their expressive activity, as well as other conduct. As we noted in our discussion of Article 134 in our brief in *Avrech* (pp. 34-38), the primary area of impact on speech of the military Articles is with respect to disloyal statements. The lawfulness and propriety of forbidding such utterances in the military is discussed there, and need not be repeated.

The obligation of officers to exercise good judgment with respect to their speech activities is necessarily greater than that of enlisted servicemen. The military must have the right to forbid speech which "undermine[s] the effectiveness of response to command" (*United States v. Priest, supra*, 21 U.S.C.M.A. at 570). Intemperate, contemptuous and disrespectful remarks, such as Captain Levy's bragging to enlisted men that "[t]he Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey" (*supra*, p. 10), necessarily undercut "the effectiveness of response to command." The Army could not function effectively if its

junior officers could thus flout the lawful orders of their superiors, and then broadcast their disobedience to men under their control.

Political speeches attacking United States military policy by military officers poses a distinct threat to the civilian control of the military. The danger to civilian control of the military was noted in *Dash v. Commanding General*, 307 F. Supp. 849, 856 (D. S.C.), affirmed on opinion below, 429 F. 2d 427 (C.A. 4) in discussing a request by enlisted men organizing a public meeting to debate the Vietnam War:

[T]o seek to create * * * within the military itself a cohesive force for the purpose of compelling political decisions—and political decisions directly related to the mission of the military itself—would undermine civilian government, especially civil control of the military, and would take from responsible civilian government the power of decision. * * *

These dangers increase with the rank of the officer attacking the war aims dictated by civilian authorities. As Mr. Wiener observed (Wiener, *Are The General Military Articles Unconstitutionally Vague?*, *supra*, 54 A.B.A.J. at 362):

It needs to be re-emphasized that if company-grade officers are free to make public attack not only on the nation's military policy but on the personal integrity of their constitutionally appointed Commander in Chief as well, then general officers would be similarly free to demonstrate and to contradict the President in public. On that view the Joint Chiefs of Staff

would be constitutionally entitled to dispute, with placards and demonstrations and public addresses * * * not only questions of basic military policy, but also the wisdom of basic social and political programs in the civilian area.

These very real concerns entitle the military to require that the expressive activities of its officers not exceed the bounds of propriety.

Nor is there a significant risk that the Article will be used to punish officers for the private expression of ideas. As we have observed (*supra*, p. 41), the statutory reach of Article 133 has been limited to serious derelictions. *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178. See also Winthrop, *Military Law and Precedents*, *supra*, pp. 711-712. Finally, the long-established traditions and customs of the service, which we discuss above (pp. 28-32), help define what is expected of an officer in his speech as well as his non-expressive conduct.

In sum, given the military responsibilities of officers, to the extent that Article 133 restricts speech which "undermine[s] the effectiveness of response to command" (*Priest, supra*), it does not offend the First Amendment.

V

IN ANY EVENT, THE CONVICTION UNDER ARTICLE 90 FOR
THE WILLFUL DISOBEDIENCE OF A LAWFUL ORDER
SHOULD STAND

The court of appeals held that the joinder of the General Articles charges with the Article 90 charge deprived Levy of a fair trial on the latter charge, and

remanded for a new trial on the latter. We submit, however, that even if Articles 133 and 134 were held unconstitutional, Levy's conviction under Article 90 for the willful disobedience of a lawful order should stand.

As Judge Seitz argued in dissenting from the majority's decision on this point (J.S. App. A, pp. 84a-90a), the court applied the wrong standard in deciding whether Levy had been denied a fair trial on the Article 90 charge. The standard should not have been whether a joint trial of the Article 90 charge created a "reasonable possibility of prejudice," but whether the joinder "substantially prejudiced" Levy's right to a fair trial on that charge. Moreover, the evidence supporting the Article 90 charge was so overwhelming that the Article 90 conviction should stand whatever standard of review is employed.

1. In evaluating the question of prejudicial joinder of offenses in courts-martial, two significant differences from civilian courts must be borne in mind. The first is that in military courts offenses must normally be joined which do not have the same or similar character. Compare, *Manual for Courts-Martial* ¶ 30g, 33h (1969) with Rule 8, Fed. R. Crim. P. Secondly, and by way of compensation for the rule just noted, the military judicial system allows an accused to testify as to any one or more of the charges without waiving his Fifth Amendment right to remain silent on the remaining charges. Thus Captain Levy could have taken the stand on the Article 90 charge without having to testify on the other charges.

As Judge Seitz pointed out (J.S. App. A, pp. 86a-90a), these differences create a situation peculiar to the military, and "federal civilian courts would rarely if ever be faced with reviewing the type of situation with which we are here confronted." Faced with the irrelevance of the existing civilian-court authorities, Judge Seitz formulated an appropriate standard for federal court *habeas corpus* review of military courts: whether the joint trial "substantially prejudiced" the fairness of the remaining constitutionally valid charge. We will show below that Levy was not "substantially prejudiced."

2. But even employing the stricter standard of review suggested by the court below, Levy received a fair trial on the charge that he willfully disobeyed Colonel Fancy's order "to establish and operate a Phase II Training Program for Special Forces Aid-Men in dermatology * * *." (J.S. App. A, p. 2a). The central inquiry is whether the joint trial affected the ability of the fact-finders to evaluate Levy's defense under the Article 90 charge that the order was illegal because motivated solely by a desire to increase possible punishment.¹⁷ In view of the evidence properly admitted on this charge, which is set forth in the Statement (*supra*, pp. 4-8), it cannot reasonably be argued that a separate trial of the charge would have diminished the force of what Judge Seitz de-

¹⁷ Levy in fact did not obey the order and his counsel at trial never contended that Levy had done so. In addition to arguing improper motivation by Colonel Fancy in issuing the order, Levy argued that the order was unlawful because it required

scribed as the "overwhelming evidence that the order did not have as its primary motive the increasing [of] defendant's punishment" (J.S. App. A, p. 91a). As Judge Seitz stated (*ibid.*):

[n]ot only did the court-martial have the benefit of extensive testimony by Colonel Fancy, the commanding officer of the hospital, who gave the order, but it had the benefit of examining the order of events in reaching a sustainable conclusion on this point. These events showed that while the order was given in early October, Colonel Fancy continued his efforts to persuade Captain Levy to comply with the order even after the initial refusal to obey. Only after several attempts at such persuasion had been rejected by Captain Levy did Colonel Fancy finally press charges. Colonel Fancy initiated this action in November, a month after the giving of and initial refusal to comply with the order. The court was not presented with a situation where the order was given one day and the charge drawn up the next.

him to commit a war crime. This point was tried outside the hearing of the court-martial, before the law officer. The law officer determined the point against Levy as a matter of law and it was never submitted to the court-martial. As the majority opinion noted, "there never was any showing that the medical training [Levy] was ordered to give had any connection whatsoever with the perpetration of any war crime" (J.S. App. A, p. 53a).

Levy also argued that the order illegally forced him to violate his medical ethics. This defense is not recognized under the UCMJ, and the law officer instructed the court that such a conflict, even if proved, did not entitle Levy to an acquittal.

We note further, as did Judge Seitz (J.S. App. A, p. 92a), that of the five charges brought against Captain Levy, the court convicted him of lesser offenses on two (tantamount to an acquittal under the UCMJ). Such discrimination as to the evidence relating to each charge shows that the fact-finders were not prejudiced by the evidence introduced on the General Articles charges. Finally, much of the allegedly inflammatory evidence introduced in the court-martial was brought out by the defense in trying to establish improper motivation. It is difficult to see how on retrial Levy would be able to prove improper motivation—the defense to which he would be relegated at a future trial (see J.S. App. A, p. 93a)—without eliciting much the same evidence.

To reverse the Article 90 conviction on the facts of this case would bar the joinder of charges permitted by the Uniform Code of Military Justice—and approved by this Court, *e.g.*, *Carter v. McClaughry*, *supra*, 183 U.S. at 386—in many cases in which a defendant is acquitted on one charge. The practical result will be to require separate trials on charges that do not arise from the same transaction. That is not the procedure Congress authorized, and there is no reason to impose such a requirement on the court-martial system.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the complaint dismissed.

Respectfully submitted.

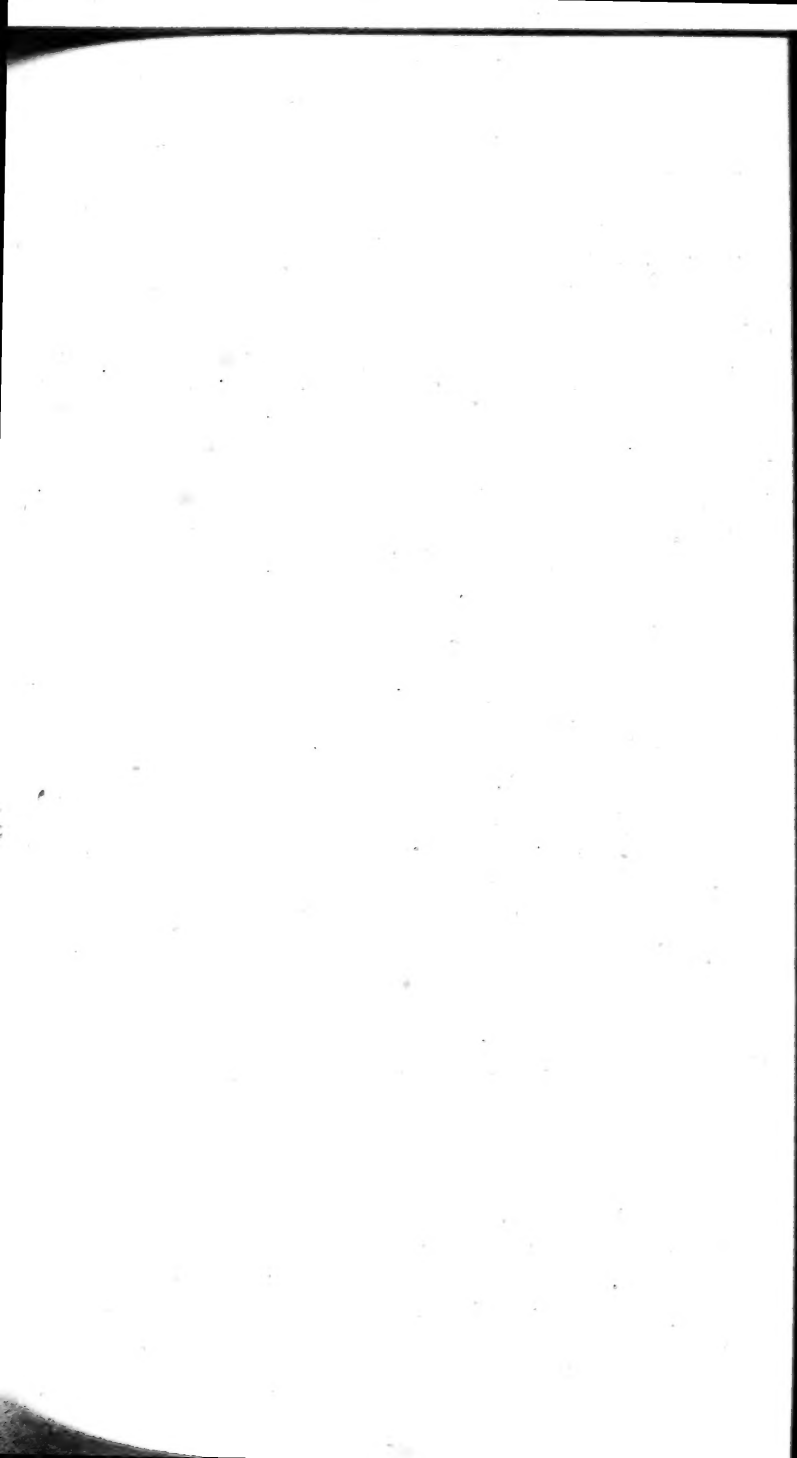
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JANUARY 1974.



FILE COPY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, *Et Al*,

Appellants,

v.

HOWARD B. LEVY

On Appeal From the United States Court of Appeals
For the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF AMICUS CURIAE IN
SUPPORT OF APPELLEE

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On Appeal from the United States Court of Appeals
For the Third Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF APPELLEE**

Pursuant to Rule 42 (3) of this Court, the undersigned moves the Court to grant leave to Richard G. Augenblick to file the attached brief *amicus curiae* in *Parker v. Levy*, (No. 73-206) and *Secretary of the Navy v. Avrech*, (No. 72-1713), both pending before this Court.¹ Augenblick's interest in *Levy* and *Avrech* arises from the fact that he, too, was convicted of a violation of the General Article, Section 134 of the Uniform Code of Military Justice (10 U.S.C. 934). The question of law raised by the Augenblick court martial, which would not otherwise be heard or briefed in these proceedings arises from the fact that

¹ Consent to this filing has been declined by the Government.

Augenblick (unlike both Levy and Avrech) was not charged with a violation of Article 134, nor was he tried for any such violation. The General Article first appeared in his prosecution after the close of all evidence and the completion of summations when the Law Officer, over Augenblick's objection, instructed the Navy court that it could find Augenblick guilty of a violation of Article 134 as a "lesser included charge" within Article 125 (Sodomy), of which he was charged and for which he was tried. The Navy court then proceeded to acquit Augenblick under Article 125 and to convict him under Article 134.

The relevance to *Avrech* and *Levy* of the procedure just described is that the use of the General Article as a "lesser included charge" within a wholly different substantive provision graphically illuminates the question of notice to the Defendant which pervades both *Levy* and *Avrech*. This is clear from the position of the Government on this question: notice to servicemen of conduct proscribed by Article 134 and the hidden presence of the Article as a "lesser included charge" is equated and urged in much the same terms in *Avrech*, *Levy* and in *Augenblick*.

Moreover, the Brief which Augenblick seeks to file meets the Government head on by accepting the Government's definition of the constitutional issue before the Court, viz. the constitutionality of the application of the General Article to these Defendants (rather than the constitutionality of the provision on its face). The arguments made in it dealing with notice, ability to defend, proof and vagueness in prosecutions under Article 134 all go to this issue. These arguments appear to be relevant to the Court's deliberations in the event the Court accepts this definition of the issue before it, and should therefore be of assistance to the Court. This is especially so since the Respondents

appear to have defined the issue differently below (viz., the constitutionality of the provision on its face) and it is likely, therefore, that their briefs will not join issue with the Government, nor brief the various points concerning an unconstitutional application of this provision.

Finally, the position taken by the Government makes it clear that if this Court sanctions the use of the General Article in *Levy* and *Avrech*, this sanction will be used by the military authorities for repetitions of the procedure used in *Augenblick*. The arguments of the Government in support of the constitutionality of the General Article when charged and when not charged have been essentially the same ones. It thus seems prudent for the Court to have before it a full briefing of the issues in *Augenblick*, so that it can determine for itself the ramifications of its decision in *Avrech* and *Levy*.

An examination of Article 134 by the Supreme Court is long overdue. In its deliberations in this benchmark case in an area hitherto almost totally unexplored by Article III courts, the Court may find comprehensive briefing on all the issues, historical and legal, of assistance. Recognizing that there are facts in *Augenblick* which differ from those in *Avrech* and *Levy* (which, as the Brief itself points out in some detail, do not dilute the relevance of this briefing to *Avrech* and *Levy*), the Court can certainly derive the benefit that may flow from this briefing and at the same time make its own judgments regarding these factual distinctions.

For these reasons, the Undersigned respectfully prays the Court to grant leave for the filing of the attached brief *amicus curiae* in *Levy* and *Avrech*.

Joseph H. Sharlitt
Counsel to
Richard G. Augenblick

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATUTES INVOLVED	3
QUESTION PRESENTED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
I. Civilian Courts Now Have Jurisdiction to Review Military Matters	6
II. <i>Augenblick</i> Graphically Illustrates the Constitutional Injury Inherent in the Use of the General Article	7

ARGUMENT:

- I. The history of Article 134 in civilian courts is a *tabela rasa*. References to the Article by civilian courts in the past occurred in holdings that civilian courts held no jurisdiction to review military matters, a conclusion no longer true 9
- II. The use of the General Article in *Augenblick* illustrates in graphic detail the constitutional injury inherent in its use today. This injury occurs as fully in *Avrech* and *Levy* as it does in *Augenblick*.

Augenblick was constitutionally deprived because: (A) He was not on notice that the conduct for which he was convicted was punishable under Article 134; (B) At court-martial,

he had no opportunity to defend himself against a charge of violating Article 134; (C) No attempt was made by the Navy to offer any proof on essential elements of Article 134, and (D) The Navy court was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure the guilt or innocence of the Defendant.

Each of these invasions of constitutional right, in varying degrees, is relevant to what occurred in *Avrech and Levy* 14

A. Each of the military Defendants was not on notice that the conduct for which he was convicted was punishable under Article 134 14

B. The Defendant had no opportunity to defend himself at court-martial, the General Article as a "lesser included charge" 17

C. No attempt was made by the Navy in *Augenblick* to offer any proof on essential elements of Article 134; the failure of proof in all of the cases before the Court 23

D. The Navy Court in *Augenblick* was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure guilt or innocence; the deliberations in *Avrech and Levy* were just as subjective 28

CONCLUSION 33

APPENDICES 1a

TABLE OF AUTHORITIES

PageCases:

<i>Augenblick v. U.S.</i> , 393 U.S. 384 (1969)	6, 16
<i>Burns v. Wilson</i> , 346 U.S. 137 (1953)	31
<i>Carter v. McClaughry</i> , 183 U.S. 365 (1902)	12
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927)	31
<i>Connally v. General Construction Co.</i> , 269 U.S. 391 (1926)	31
<i>Dynes v. Hoover</i> , 20 How. 65	10, 11, 29
<i>Kelly v. United States</i> , 370 F.2d 227 (1966)	18
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1969)	31
<i>Parker v. Levy</i> , (No. 73-206)	passim
<i>Secretary of Navy v. Avrech</i> , (No. 72-1713)	passim
<i>Smith v. Whitney</i> , 116 U.S. 167 (1886)	10, 11
<i>Swaim v. United States</i> , 156 U.S. 555 (1896)	11, 17, 30

	Page
<i>United States v. Avrech</i> , 477 F.2d 1245 (1973)	16
<i>United States v. Fletcher</i> , 148 U.S. 84, 92 (1893)	11
<i>United States v. Jones</i> , 13 C.M.R. 420 (1953)	20
<i>United States v. Sadinsky</i> , 14 U.S. C.M.A. 563 (1964)	24

Constitution and Statutes:

Constitution of the United States,	
5th Amendment	passim
6th Amendment	passim
Uniform Code of Military Justice,	
Article 32 (10 U.S.C. 832)	19
Article 79 (10 U.S.C. 79)	4, 19
Article 80 (10 U.S.C. 880)	3
Article 90 (10 U.S.C. 890)	5
Article 125 (10 U.S.C. 925)	3, 5, 17, 20, 21
Article 133 (10 U.S.C. 933)	5
Article 134 (10 U.S.C. 934)	passim
Rule 31(c), F.R. Crim. P.	18

Miscellaneous:

<i>Manual for Courts-Martial</i> (1951) (1959 Supp.)	20, 25
<i>Manual for Courts-Martial</i> (1969)	20, 26
<i>Wiener, Are the General Military Articles</i> <i>Unconstitutionally Vague?</i> , 54 ABA Journal	
357	13

IN THE
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No. 73-206

JACOB J. PARKER, *Et Al.*,

Appellants,

v.

HOWARD B. LEVY

**On Appeal From the United States Court of Appeals
For the Third Circuit**

**BRIEF AMICUS CURIAE IN
SUPPORT OF APPELLEE**

INTRODUCTION

This Brief is filed *Amicus Curiae* in *Parker v. Levy* (No. 73-206) and *Secretary of the Navy v. Avrech* (No. 72-1713), both pending now before this Court because it raises a related question most relevant to the issues before the Court in those cases. That question is: Whether a military Defendant who is not charged with a violation of Article 134 (UCMJ), and whose trial on a wholly differ-

ent charge proceeded through the close of all evidence and summations before Article 134 was first asserted by the military authorities at the close of trial, can nonetheless be convicted of a violation of Article 134 as a "lesser included charge" within the charge asserted against the military Defendant for which the Defendant was tried and acquitted. Viewed alongside either the Government's definition of the key issue in *Avrech* and *Levy* (a test of Article 134's application to *Avrech* and *Levy*), or as Respondents both have urged below (a test of the Article's constitutionality on its face), the use of Article 134 as a "lesser included charge" within a very different substantive provision graphically illuminates the question of notice to the Defendant which so pervades both *Avrech* and *Levy*.

In addition, the facts and outcome of the *Augenblick* court-martial raise two other issues which are most relevant to the disposition of *Avrech* and *Levy*, no matter which view of the case the Court adopts. Those two issues are: (1) *Proof*, i.e., what must be proved by the prosecution under Article 134, and (2) *Vagueness*, as that term applies to the wholly subjective deliberation permitted the guilt-finding military court. It is submitted that the latter problem is a very different one from vagueness within the context of notice to a charged defendant.

Whereas the Government and the Respondents have defined the issue before the Court differently and consequently have, in all likelihood, briefed it differently, this brief meets the Government head on, accepts the Government's definition of its constitutional controversy before the Court and direct its arguments to the essence of the Government position. In establishing the unconstitutionality of Article 134 as applied to these military defendants, this brief should be of aid to the Court in its deliberations on this issue.

For these reasons, the facts of *Augenblick* and the briefing in connection therewith supplied herein are relevant to and, we submit, of assistance to the Court in its deliberations in *Avrech* and *Levy*.

STATUTES INVOLVED

Article 134 (10 U.S.C. 934) of the Uniform Code of Military Justice provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the Court."

Article 125 of the Uniform Code of Military Justice (10 U.S.C. 925) provides:

"(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

Article 80 of the Uniform Code of Military Justice (10 U.S.C. 880) provides:

"(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

Article 79 of the Uniform Code of Military Justice (10 U.S.C. 879) provides:

"An accused may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein."

QUESTION PRESENTED

Can Article 134 of the Uniform Code of Military Justice be constitutionally used to convict a military defendant not charged or tried for violation of that Article, when the Article is used as a "lesser included charge" within a different substantive provision of the Code under which the Defendant was charged and acquitted?

STATEMENT OF THE CASE

Augenblick was charged and tried for a violation of Article 125 (UCMJ) (App. A-1¹). He was never charged under Article 134; therein lies the major difference between *Augenblick* on the one hand, and *Avrech* and *Levy* on the other. Both *Avrech* and *Levy* were charged under Article 134. *Avrech* was also charged (and convicted) under Article 80 (quoted above) for the attempt to commit the offense charged under Article 134. *Levy* was also charged (and convicted) under Article 133 (10 U.S.C. § 933) – (“conduct unbecoming an officer and gentleman”) and Article 90 (10 U.S.C. § 890) – (“willful disobedience of a valid order”). This Brief will discuss only the Article 134 issue. In the *Augenblick* court-martial, the General Article first appeared after the close of all evidence when both sides had rested.² The Law Officer, then, over the objections of *Augenblick*’s trial Counsel, instructed the Court that it could find *Augenblick* guilty of a violation of Article 134 as a “lesser included charge” within Article 125.³ The court-martial then acquitted *Augenblick* of the charge under Article 125 but found him guilty of the newly offered charge under Article 134.^{4,5}

¹ The portions of the record before the Navy court-martial referred to are attached to this brief as Appendix A.

² App. A-2, App. A-4.

³ App. A-5.

⁴ App. A-1.

⁵ Because this case has been before this Court before, it is appropriate to record the procedural history in it since its first appearance here, and this is done in the photostats of the docket entries

[cont’d]

SUMMARY OF ARGUMENT

I:

The history of Article 134 in civilian courts is a *tabula rasa*. References to the Article by civilian courts in the past occurred in holdings that civilian courts held no jurisdiction to review military matters, a conclusion no longer true.

⁵[Cont'd]

in this Court and in the Court of Claims attached to this brief as Appendix B.

In its first appearance, this Court determined that the violation of the Jencks Act during his prosecution asserted by Augenblick did not fall within the jurisdiction of review by the Court of Claims because Jencks Act rights are granted by statute whereas Court of Claims review of military convictions is traditionally restricted to deprivation of constitutional right. *Augenblick v. U.S.*, 393 (1969), rendered on January 14, 1969.

Special note should be taken of the following docket entries attached in Appendix B reflecting proceedings here and in the Court of Claims since then:

(1) The entry of October 24, 1969 in this Court, extending the time for filing of a response by the Government to Augenblick's petition for certiorari (on file with this Court since September 2, 1969) until Augenblick filed another petition for certiorari to review action of the Court of Claims upon his Motion in that Court of July 14, 1969. His Motion of July 14, 1969 sought leave to place before the Court of Claims the same arguments raised herein: the unconstitutionality of the use of Article 134 as a "lesser included crime".

(2) In the Court of Claims docket: the entries of June 14, 1971, December 17, 1971, April 28, 1972, August 17, 1973, September 24, 1973 and October 3, 1973 reflect the procedural impasse in which this case has become ensnarled. On June 14,

II:

The use of the General Article in *Augenblick* illustrates in graphic detail the constitutional injury inherent in its

⁵[Cont'd]

1971 the Court of Claims ordered full briefing of this cause, citing specific issues it wished argued, including specifically the Article 134 issue. Three briefs were filed pursuant to that order. In the December 17, 1971 order, the cause was ordered to be placed on the calendar for oral argument. On April 11, 1972 the Clerk of that Court wrote the undersigned that the cause had been removed from the oral argument calendar. In his April 28, 1972 Motion, Augenblick sought again to place the case on the calendar for argument so that a decision in it could be reached. This motion was denied by that Court on May 5 without prejudice to its being renewed. On July 3, 1973, Augenblick moved for the second time to have the case placed on the calendar for argument so that it could reach decision. On August 17, 1973 the Motion was granted and further briefing requested so that the Court could be informed on intervening developments on the issues (including the Article 134 controversy) since its first briefing in 1971. Three additional briefs were filed by the parties citing, inter alia, the probable pendency of *Avrech* and *Levy* in this Court. On September 24, 1973, that Court again entered an order removing the cause from the calendar for oral argument. Augenblick's Motion for Reconsideration of this Court's Order of September 24, 1973, (seeking, again, disposition of the cause) was never acted on.

Augenblick makes no complaint regarding the procedures in either court. But what has manifestly occurred is the entry of a stay of proceedings in this Court pending adjudication of the Article 134 issue in the Court of Claims and a determination in that Court (following three efforts by Augenblick to secure a decision in the case from that Court and two moves by that Court to go forward to decision only to have the Court reverse itself both times) to stay proceedings in that Court awaiting action by the Supreme Court on the Article 134 issues. Thus the Article 134 issue raised by Augenblick in both courts in 1969 has been tied in this impasse between Courts, and has not reached decision in the time since.

use today. This injury occurs as fully in *Avrech* and *Levy* as it does in *Augenblick*.

Augenblick was constitutionally deprived because:

- (A) He was not on notice that the conduct for which he was convicted was punishable under Article 134;
- (B) At court-martial, he had no opportunity to defend himself against a charge of violating Article 134;
- (C) No attempt was made by the Navy to offer any proof on essential elements of Article 134;
- (D) The Navy Court permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure the guilt or innocence of the Defendant.

Each of these invasions of constitutional right, in varying degrees, is relevant to that in *Avrech* and *Levy*.

ARGUMENT

I.

The history of Article 134 in civilian courts is a *tabela rasa*. References to the Article by civilian courts in the past occurred in holdings that civilian courts held no jurisdiction to review military matters, a conclusion no longer true.

Some form of the General Article has been present in military justice in this country since Independence. Applying separately to officers and enlisted men, these provisions were revised in 1806, rearranged and newly numbered in 1874, and then became Article 95 and 96 in the most recent version of the Articles of War signed by President Wilson in 1916. When the Uniform Code of Military Justice was enacted in 1949, 134 drew most of its language from the Army version, but the old Navy and Marine Corps General Article did not vary in substance from the New General Article. There is a separate body of lore forming the history of Section 133's "conduct unbecoming an officer". We are concerned here, however, with the impact of the equally broad, equally vague provisions of Section 134.

With the slow dawning of constitutional review of military convictions in the first half of this century, Section 134 became an obvious target. Its language is offensive to any civilian lawyer bred to notions of objective standards for criminal conduct. The attack on Section 134 has generally been along these lines: the phrases that form the gravamen of any accusation under the section under the section are necessarily so vague that the objectivity and precision so essential to due process are missing. Military courts, however, have always sustained the section against these attacks.

At the end of the 19th century there was a forty-five year period in which the General Article received some scrutiny from the civilian courts. But, with the exception of one case in 1871, this civilian scrutiny was limited to inquiry into the jurisdiction of the military court that had convicted under the General Article. And, in 19th century (and 1902) terms, this inquiry was restricted to finding whether the military court had jurisdiction over the person of the defendant and adhered to its own procedures.

The earliest of these cases, *Dynes v. Hoover*, 20 How. 65, in 1875, found Dynes suing the warden of the District of Columbia penitentiary for false imprisonment because the defendant was imprisoned for attempting to desert the Navy and found guilty under the General Article. Recourse to the General Article was necessary because his attempt had failed and he could not be convicted of desertion. Following a discussion of the General Article, the court proceeded to hold:

“With the sentence of court martials which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them.” 20 How. at 82.

In 1886, Smith, a Navy officer engaged in fraud and corruption was charged under the General Article and sought a writ of prohibition against his prosecution. Again the Article is discussed but the holding of the Court in *Smith v. Whitney*, 116 U.S. 167 (1886) is entirely jurisdictional – 19th century style:

"This" (issue the Writ of Prohibition) "we are not prepared to do, being clearly of opinion that said conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court martial in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury." 116 U.S. at 186.

The microscopic jurisdictional dimensions of civilian review of courts martial in those days is easily seen in the next instance in which the General Article arose. One Fletcher, an officer, did not pay his debts in 1872. Brought before the military authorities under the General Article, the Supreme Court was brief in disposing of his attempt at civilian review of his conviction under the General Article:

"As the Court Martial had jurisdiction, errors in its exercise, if any, cannot be required in this proceeding." *United States v. Fletcher*, 148 U.S. 84, 92 (1893)

Dynes v. Hoover and *Smith v. Whitney* were the example of this severe limitation on civilian judicial inquiry cited to support the summary rejection of Fletcher's argument. The result was no different three years later in *Swaim v. United States*, 156 U.S. 555 (1896). Swaim, after his conviction under the General Article for fraud, went to the Court of Claims for review. He was rejected there. On review the Supreme Court paid lip service to the peculiar nature of military justice and the place within it of the General Article. But the Supreme Court took pains to fix its *holding* within the narrow jurisdictional

perimeter which confined the 19th century Article III Courts when dealing with military justice.

"As we have reached the conclusion that the court martial in question was duly convened and organized, and that the question decided was within the lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of the Court in its proceeding and sentence. If, indeed, as has been strenuously argued, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the Courts of Law." 156 U.S. at 566.

If there were any doubt that the constitutional adequacy of the General Article escaped testing in the only cases ever brought in civilian courts, the last of the line, *Carter v. McClaughry*, 183 U.S. 365 (1902) dispels the doubt. The Court again simply spun the prayer wheel of deference to military custom. Its ruling ~~could not~~ be clearer.

"But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of court martials, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed." 183 U.S. at 901.

It is entirely accurate to conclude that the constitutionality of the General Article never generated any

doubt in the Supreme Court of the United States during that prehistoric period (in terms of civilian review of courts martial), because the Supreme Court felt that it had no lawful authority to review matters of military justice. And among those matters which flourished from 1857 to 1902 in the forbidden garden of military jurisprudence, walled off from any civilian inquiry, was the General Article.⁶

But, of course, the walls prohibiting the Federal courts (and especially the Supreme Court) from peering within the military keep have long been opened. Colonel Wiener, in his 1968 article on Section 134⁷ views the core problem of constitutionality to be vagueness and openly questions where the decisions voiding civilian statutes for vagueness (which commenced in 1921) leaves the General Article, last viewed by the Supreme Court in 1902.

The problems raised by Section 134 in this case are, however, considerably broader. They can fairly be summarized by placing the General Article alongside contemporary constitutional rules in 1971, now that civilian courts have broken the jurisdictional bonds of 1902 and

⁶ If there is an aberration in the line of hands-off decisions sharply restricting civilian courts from an inquiry into the constitutionality of the General Article, it is an ancient one. On one occasion in 1881, the Supreme Court permitted itself to hold, apparently, that it could go to the merits of the General Article. Mason, a soldier assigned to guard Guiteau, the assassin of Garfield, took a shot at Guiteau while on duty and tried to kill him. In *Ex parte Mason*, 105 U.S. 426, the Court went straight to Mason's breach of discipline and sustained his conviction under that clause of the General Article.

⁷ Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 ABA Journal 357.

can examine this provision and *all* of the constitutional doubts — not only vagueness — that its use throws up. Unlike 1902, in 1971 servicemen have undoubted, extensive constitutional rights and access to the Federal courts to protect them. In 1971, thus, a constitutional test of the General Article is a benchmark case, coming to the civilian court as it does to this court, as a matter of first impression with little or no precedent to bind it.

II.

The use of the General Article in Augenblick illustrates in graphic detail the constitutional injury inherent in its use today. This injury occurs as fully in Ayrech and Levy as it does in Augenblick.

Augenblick was constitutionally deprived because: (A) He was not on notice that the conduct for which he was convicted was punishable under Article 134; (B) At court-martial, he had no opportunity to defend himself against a charge of violating Article 134; (C) No attempt was made by the Navy to offer any proof on essential elements of Article 134, and (D) The Navy court was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure the guilt or innocence of the Defendant.

Each of these invasions of constitutional right, in varying degrees, is relevant to what occurred in Ayrech and Levy.

A. Each of the military Defendants was not on notice that the conduct for which he was convicted was punishable under Article 134.

Assuming that the military defendant is specifically charged under Article 134 (as Levy and Ayrech were,

and as Augenblick was not), the problem of vagueness is in no way solved. The Government solves it by contending that the military community is a "specialized society governed by special rules and customs well-known to its members" (Gov. Br. in *Avrech*, 12-18, 27-33). These rules and customs are, apparently, presently engrafted in the Manual for Courts Martial and it is from this Manual that the individual serviceman ostensibly receives notice in advance that certain conduct is proscribed.

There are three major difficulties in this view.

First, servicemen are not convicted of formulations or definitions of crimes set down in a Manual, they are convicted of offenses set out in a *federal statute*. Indeed, it is quite clear that the military authorities could not themselves create military crimes by describing them in the Manual. Neither the Manual's specifications nor the listing of crimes that are set out in its Appendix answer the question of whether the *statute* under which a prosecution under 134 must proceed is clear enough to put the serviceman on notice of what is criminal and what is not.

This is especially true because the appendices that list the offenses ostensibly embraced within the General Article at any time are entirely ambulatory. The Manual Appendix cited by the Government in its brief in *Avrech* (at p. 29) contained 63 different specifications. If the military authorities can expand or contract the scope of Article 134 by additions or deletions to the Manual they are, indeed, supervening the function of the Congress — from whence the authority to convict is derived within the terms set out by the Congress. If the military authorities wish the discretionary power to convict in the disparate and often inconsistent manner that they have under Article 134, let them go to Congress for the power

in specific amendments to the Uniform Code. To permit free-wheeling through a federal criminal code for methods of convicting military defendants beyond the terms of the statute is an affront to fundamental due process.

The notion that servicemen live in a world governed by custom, not law, enforced by authorities who apply this custom as part of accepted military law, is a throwback to the age before enactment of the Uniform Code. Yet the Government urges it in *Avrech* (Gov. Br. 27-54) and it has urged it to the Court of Claims in *Augenblick* (Gov. Br. dated November 11, 1971 filed in *Augenblick v. U.S.*, 357-64). The succinct refutation to this was given by Justice Clark, below, in *Avrech*:

"... the Government says the clear knowledge of *Avrech* that his actions might lead to a court-martial shows that he had fair warning that Article 134 prohibited his proposed action. The fear, if any, which *Avrech* had that his action might lead to his court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There the Court found "it irrelevant that petitioners" at one point testified that they had intended to be arrested," since "the record is silent as to what petition intended to be arrested for" Whether a statute afford "fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants." 477 F.2d at 1245

Finally, it must be emphasized that penal law-making by custom has never been sanctioned by an Article III Court in the last 79 years since *Swaim*, supra, or at least in the last 72 years since *Mason*. It is time now for the military authorities to become governed by the advances in military law that have occurred during those years, by this Court's utterances on numerous occasions in recent years that our military personnel have substantial constitutional rights not theretofore recognized, and by the giant step toward enlightened criminal procedures provided by the enactment of the Uniform Code.

B. The Defendant had no opportunity to defend himself at court-martial, the General Article as a "lesser included charge."

The next difficulty arising from the military use of the General Article is demonstrated by the Navy's failure to charge Commander Augenblick of its violation. Section 134 was never mentioned until all evidence was in at his court-martial; he was, in consequence, wholly disabled from defending himself against the charge. Article 134 was first mentioned at the point when the law officer (over the objection of defense counsel) was preparing to instruct the court immediately before the case was submitted to its members for their consideration and verdict. It was made available to the Court as a "lesser included offense" within the charge⁸ actually levied against the defendant.⁹

Under those circumstances, Section 134 could not be properly used to convict this defendant. Under these cir-

⁸ Sodomy, Under Article 125, U.C.M.J.; Article 134 *not* charged at the outset, or during the proceeding except at its close.

⁹ App. A-1.

cumstances it could not properly constitute a "lesser included offense" of which the defendant had notice required in due process.

The concept of a "lesser included charge" is one that has frequently troubled courts because of the inherent problem of notice to the defendant that he may be convicted of a crime which, at least *in haec verba*, is not charged against him. Civilian courts dealing with this problem have developed simple safeguards against abuse. Rule 31 (c), Federal Rules of Criminal Procedure embodies one such safeguard:

"The defendant may be found guilty of an offense *necessarily* included in the offense charged or of an attempt to commit either the offense charged or an offense *necessarily* included therein if the attempt is an offense." (Emphasis supplied)

The use of "necessarily" imparts definite standards, both legally and as a matter of factual guarantee that the defendant be given some inkling that hidden beneath the language of his indictment there exist other accusations of which he is in jeopardy. In the many cases where a conviction of a "lesser included offense" is reached, no one could doubt either its validity or the palpable notice given the defendant of the plural charges against him (viz., 2nd degree murder, manslaughter and assault in the 1st degree murder cases; all attempts to commit crimes, where the attempt itself is criminal). The rule has sense and some considerable fairness based on the reasonableness of notice.

Where, however, this notice is less than fair and clear, the civilian courts have balked. Perhaps the most cogent formulation of this is found in *Kelly v. United States*, 370 F.2d 227, a 1966 opinion in the District of Columbia circuit. The defendant, charged with sale-facilitation in the

indictment, asked the court to instruct on the lesser included offense of possession of narcotics. Possession was not included in the indictment, but proof of possession was adduced at trial. The Court held, in language notably applicable to the case at bar:

"Although the doctrine may also be invoked by defendant, his right to invoke it does not extend beyond the right of the prosecutor. The right of the prosecutor is *limited to the offense of which the defendant has been given notice* by the indictment and the defendant is not subject to conviction for other offenses because of the nature of the proof. What is *controlling is the offense charged in the indictment, not the offense established by the trial proof*, whether it is the prosecutor or the defendant who is seeking extension from the offense charged to another offense as 'necessarily included.'" (Emphasis supplied.) 320 F.2d at 229.

If "notice by the indictment" is the standard in civilian courts, the same rule — at least nominally — applies to the military. The requirement of Article 32 (b) of the Uniform Code (10 U.S.C. 832) that "The accused shall be advised of the charges against him" can be met in no other way.¹⁰ Article 79 of the Uniform Code defines a "lesser included offense" in terms undistinguishable from its civilian counterpart:

"An accused may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense *necessarily* included therein." (Emphasis supplied.)

¹⁰ App. C-1.

The test, then, is whether Commander Augenblick had "been given notice" that the conduct finally relied on by the Navy court for its conviction was available to it to convict him, and whether this notice *necessarily* arose from the charge placed against him at the outset.

The only specific information that a serviceman might have of the range of charges not appearing on the face of his indictment but nonetheless available for use by the Court is the notice provided by the Manual for Courts-Martial. Indeed, the prescribed availability of the Manual has been looked to as satisfaction of the notice requirement in *Levy and Avrech*. Appendix 12 of the Manual lists "commonly included offenses". The 1951 Manual, which with its 1959 Supplement, was in effect in 1961 when Commander Augenblick's alleged offense and trial took place, lists *no* offenses as included with Article 125. It was not until the issuance of the 1969 Manual that Section 134 was listed as an included offense within Article 125 charge. Thus, the commonest form of notice to all servicemen of the multiplicity of offenses he is in peril of, though not charged with, could not be given in Commander Augenblick's case.

The Manual, however, as shown above, is ambulatory and does contain an admonition that it may not be all inclusive. And there *were* military cases prior to 1961 in which military tribunals convicted under 134 as a lesser offense when 125 was charged, *United States v. Jones*, 13 C.M.R. 420 (1953). But this is hardly "notice" adequate to justify use of 134 as a "lesser included offense" under either civilian law or the Uniform Code. It runs directly afoul of Section 79's definition of what a "lesser included crime" may be. To fall within the definition, conduct must *necessarily* be included in the offense charged. The finding of a Court in 1953 that certain acts of un-sodomy

or near-sodomy constituted a violation of Article 134 cannot constitute notice that other acts among the indefinite combinations and permutations of sexual irregularities will necessarily violate 134.

The basic problem with any serviceman — or his lawyer — inferring from a charge under 125 that 134 is in the wings, and may be brought out at the close of trial *is that two elements of criminal conduct must be established for guilt under 134 which are not present in 125*. Physical conduct must be shown — under 134 — but this conduct is only the first of the elements of the offense. “Prejudice to good order and discipline” or “discredit to the Armed Forces” resulting directly from this conduct must also be established. Neither of these elements is present in Section 125. Accordingly, a finding by a 1952 court that these elements might have been present in the circumstances of the 1952 prosecution for sodomy is no notice that different conduct, under different circumstances, would be similarly embraced by a sodomy persecution.

And, indeed, how could Section 134, which contains two elements entirely missing from Section 125 even be “necessarily included” within Section 125? Prosecutions under the latter do not touch on the impact of the offense, either on the accused’s station, his service or his service’s reputation. Unless Section 134 is to be judicially amended to do away with two of the elements it can never be necessarily included within 125. It is a literal impossibility, therefore, for any serviceman, or his lawyer, to be charged with notice that Section 134 may loom out of the closing hours of his sodomy trial to assist the prosecution when the prosecution finds itself unable to prove the charge before it.¹¹

¹¹ If a Navy prosecution can find refuge in Section 134 whenever it finds itself in difficulty in proving a sodomy charge under

Thus, *Augenblick* discloses that the General Article is a moveable feast from which prosecutors may draw sustenance whenever they are in trouble. This is true notwithstanding the reality that involved here is a criminal statute whose inclusion within other must be tested by its own words.

The salient aspect — relevant to *Avrech* and *Levy* — of the Navy's improper use of Article 134 in *Augenblick* is that sanction of the General Article in the cases before the Court will lead inexorably to repetitions of the use of this provision as it was employed in *Augenblick*. If the Article's language is sufficiently specific to put servicemen on notice of proscribed criminal conduct stretching from "abusing a public animal" to "breaking a medical quarantine", it takes no metaphysical powers to extend this special form of specificity to include notice that this array of criminal charges is also available to prosecutors who cannot prove the elements of other substantive crimes and seek out 134 to salvage a conviction. The test of specificity where Article 134 has been charged may differ from where it has not, but the Government apparently does not believe so. It has argued precisely the same "notice by custom" in both *Avrech* and *Augenblick* (in the Court of Claims). It is for

¹¹[Cont'd]

Section 125, the range of charges not appearing on the face of the Section 125 indictment but nonetheless available for use by the prosecution number no less than fifty-eight, extending from "abusing a public animal" through defaulting on debts and "breaking a medical quarantine" to wearing unauthorized insignia (Manual for Courts Martial, 1951, Appendix 6, pp. 488-495). If, somehow, 134 is "necessarily" included within a charge under 125, each and every one of these fifty-eight charges are "necessarily included" and may be used if the proof happens to stray into facts which the prosecution might find useful if it ran into trouble proving its indictment.

this reason that this issue, the use of the General Article as a "lesser included charge" is a graphic demonstration of the mischief inherent in the Article's use, and relevant indeed in the cases before this Court.

C. No attempt was made by the Navy in Augenblick to offer any proof on essential elements of Article 134; the failure of proof in all of the cases before the Court:

The second constitutional defect in the use of the General Article in *Augenblick* is that its elements were not proved. The complaint here is not a simple lack of evidence; it is failure of any attempt to prove two elements of a crime.

What is argued here is equally applicable to *Levy* and *Avrech*. Obviously both records differ factually from each other and from *Augenblick*. But common to all three, and a key to the frequent use of the General Article by military prosecutors, is the ignoring of elements of 134 as if they were not really elements of a crime which must be proved before guilt can be pronounced.

What transpired after the law officer made the General Article available to the *Augenblick* court was —abject silence on the question of proof. There is no other way to characterize the conduct of the law officer than to state that he simply assumed that evidence demonstrating prejudice to good order and discipline and discredit to the armed forces was in the record and of sufficient weight to permit the Court to find guilt.

What is this evidence? There was not a word of evidence that went to any point in this case except the physical conduct of the defendant. The impact of the law officer's conduct was an *assumption* that all of this testimony went also to the issues of whether this conduct was prejudicial to good order and discipline and discrediting to the service.

If this assumption was a proper one, the two elements¹² of the General Article here in play would be rendered total surplusage, because evidence of the "disorders and neglects" — the alleged conduct of the defendant — would also *automatically* constitute sufficient evidence under these separate provisions of the Article to get the prosecution to the jury on all elements of a charge under the Article.

Not even the military, itself, takes this position. Aware of the legal warts appearing on the surface of the General Article in contemporary jurisprudence, military tribunals have taken pains to point out that some nexus between the defendant's conduct and the controversial clauses of the General Article must be made out by the prosecution:

"... The General Article is not such a catch-all as to make every irregular, mischievous, or improper act a court-martial offense. Rather, as this Court stated in *United States v. Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28:

"... The Article contemplates only the punishment of that type of misconduct which is directly and palpably — as distinguished from indirectly and remotely — prejudicial to good order and discipline." *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 564-565 (1964).

If a direct and palpable connection between conduct and good order and discipline must be shown, some one must show it; to do so, evidence of some kind must be offered by the prosecution probative of this direct relationship. The Manual of Courts Martial repeats this requirement:

¹² "to the prejudice of good order and discipline"; "conduct of a nature to bring discredit upon the armed forces"

"An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the Article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable." (para. 213a, Manual for Courts Martial (1951))

No law officer may, therefore, properly make the simple assumption that the "disorder or neglect", (viz., the physical conduct involved) ipso facto and necessarily violates Section 134. The *prejudice to good order and discipline*, as well as the *discredit to the armed forces* must be *proved*.

Moreover, the Manual enumerates the separate elements of proof under Section 134 that form the burden of the prosecution:

"Para. 213d. The proof required for conviction of an offense under Article 134 depends on the nature of the misconduct charged . . . One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213 (f)^[13] and

¹³ Offenses not embraced within 134's "crimes and offenses not capital", the "lesser included offense" herein was given to the Court under 134's other provisions, not under the "crimes and offenses" provision.

should be included in instructions as to the elements of these offenses, *in addition* to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

- (1) That the accused did or failed to do the act, as alleged, *and*
- (2) *That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. (Emphasis supplied.)*

Manual for Courts Martial, 1969, pp. 28-73.

Clearly, then *proof* of the impact of the defendant's conduct on order and discipline and on the public image of the service is separate from proof of the defendant's conduct itself, and a necessary element for conviction. This requirement of proof cuts across *Augenblick*. It strikes at the sufficiency of evidence of the physical conduct of the defendant, and that evidence alone, on the broad second element of this crime: the impact of this conduct on the defendant's service, and service's reputation. It strikes at the propriety of submitting this case to the trier of fact without a word of proof bearing on the relationship of this conduct to a far broader entity, that of the discipline and order of the post at which the defendant was posted, and its impact (if any) on the Naval establishment generally.

While elements in each of these records differ, there is the common absence of testimony in all three that goes to the point of *impact* of the words and deeds. No presumption in favor of the prosecution can be used here; direct evidence of prejudice to good order and discipline or

direct evidence of discredit to the Armed Forces must be shown — wholly apart from the words and deeds — if they are to be transmitted from private acts or communications into elements of a crime which Congress has defined to be public in nature.

The mischief in permitting the absence of such proof is compounded by the special facts in *Augenblick*. If the prosecution offered not a shred of evidence going to these points in *Augenblick*, the defense, certainly, had no opportunity whatsoever to demonstrate that this defendant's conduct (even if he had performed the "lesser included" lewd and lascivious" act) was private in nature, did not bear on discipline or good order at the time or in this officer's reasonably foreseeable future, and had consequences sufficiently cloistered to preclude any substantial public opprobrium from falling on his service. Yet that is the exercise in proof that the Article and the Manual for Courts Martial require of the prosecution and permit of the defense. But at the point in the procedure when the General Article first surfaced, the prosecution's lapse was simply ignored and it was too late for this effort by the defense.

All evidence was in and the record closed. Thereupon the law officer proceeded to ignore the requirements of proof incumbent on the prosecution on two elements of the charge newly before him. He ignored the manifest foreclosing of defense evidence on these elements. He assumed sufficiency of proof of impact on discipline and order, he assumed sufficiency of proof on discredit, he proceeded oblivious of defendant's right of proof on these same points — and gave the case to the Court.

D. The Navy Court in Augenblick was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure guilt or innocence; the deliberations in Avrech and Levy were just as subjective.

At the close of trial of seven days in *Augenblick*, the law officer instructed the court. His instruction under Article 134 is quoted verbatim:

"If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force, but which act fell short of sodomy; and, two, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code." (TR VII-369)¹⁴

¹⁴ No greater objectivity was provided the *Levy* or the *Avrech* courts. They were instructed very largely by reading the language of 134, as was the *Augenblick* court.

The Court then retired, recalled the law officer to report an acquittal of sodomy but finding of guilt on the lesser included charge. The law officer then assisted the Court in drafting a specification on this charge, which the Court completed and returned. The Court made no comments or reference to Section 134, except to find guilt under it.

The full folly of the assessment of guilt under Article 134 is displayed by the finding of the *Augenblick* court. No inkling is given whether this Defendant was found guilty by the Court of a "disorder . . . to prejudice of good order and discipline" or of "conduct of a nature to bring discredit upon the Armed Forces".¹⁵ Yet guilt under one clause or the other must be found if a conviction under 134 is to have any validity. Thus, the broad brush of vagueness persisted in the *Augenblick* prosecution through the judgment of the Court.

Looking backward to the time when civilian courts were foreclosed from review of any kind over military convictions, this kind of result brought comment from courts which found, even then, the result alien to civilian jurisprudence. These comments were recognitions of the wide spaces in the law that stretched between the jurisprudence common to the Federal courts and that of the military. *Dynes v. Hoover*, supra, in 1857 brought the expression:

"Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is known by practical men in the Navy and Army, and

¹⁵ See Appendix A-1.

by those who have studied the law of the courts martial and the crimes of which the different courts martial have cognizance.”
(20 How. at 82).

Judge Nott of the Court of Claims, in *United States v. Swaim*, supra, wrote of this peculiar kind of emanation, the General Article, which troubled the jurist in much the way that a barbaric practice of the Chinese might:

“The cases which involve conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge or experience of military law, its usage and duties.”
(28 Ct. Cls. at).

Seventy-nine years ago military justice was a foreign code of conduct entirely unrelated to any form of due process. Judge Nott also made this clear in *Swaim*:

“When a person enters the military service, whether an officer or private, he surrenders himself to a code of laws and obligations wholly inconsistent with the principles which insure our constitutional rights.” (28 Ct. Cls. at 217).

But we are not in the 19th century of unquestioned military latitude in these matters. The extension of the habeas corpus jurisdiction to the military in the 1940's, the passage of the Uniform Code of Military Justice, and the affirmation in *Burns v. Wilson*, 346 U.S. 137 (1953) that servicemen possess substantial constitutional rights which must be safeguarded by the Federal courts, and, of

course, the directives of *O'Callahan v. Parker*, 395 U.S. 258 (1969), place these utterances of 100 years ago amongst the constitutional antiques that can no longer be accepted without question.

All civilian courts are agreed that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 391 (1926). Similarly, all courts agree that:

"It will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927)

To all courts, the purpose of these constitutional strictures against vagueness are (1) fair warning to the potential criminal offender (discussed earlier) and (2) standards sufficiently precise to guide the court and the jury in determining whether a crime has been made out.¹⁶

¹⁶ See Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 Rocky Mt. L. Rev. 275 (1957), *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939; *Herndon v. Lowry*, 301 U.S. 242 (1937), among the dozen of contemporary decisions envalidating criminal statutes lacking objective standards for determining guilt; e.g., "Any attempt, by persuasion otherwise to induce others to join in any combined resistance to lawful authority of the state" (*Herndon*, *supra*, with the Court noting the infinite array of cause

Consequently, civilian courts need not and cannot remain aloof in 1971 from the spectacle of seven naval officers left entirely without judicial guidance determining whether an officer charged of an offense abhorrent to the Navy is to remain an officer or is to be stigmatized beyond repair for life. It is far too late in the day, at least thirty years too late insofar as constitutional safeguards are concerned, for military custom, or even "an actual knowledge of experience of military law" to substitute for the rudiments of constitutional protection. These relics among judicial restraints cannot today, some seventy-one years after the last civilian court looked at them, take the place of an objective definition of a crime so stigmatizing that the reputation of a lifetime is forfeited because seven men chance to be morally offended.

Can men of common (or even uncommon) intelligence do anything but guess as to what might "prejudice good order and discipline", since what constitutes this same good order and discipline is totally without judicial or lay definition? One may search the literature of military reports in vain; the concept has no written metes or bounds. It is totally within the mind of the individual enforcer of order and discipline, and therefore infinitely variable.

Can words more capable of an infinity of private definition be found? Can words more given to one meaning in the mores of 1949 and another in the society of 1971,

16 [Cont'd]

and effect relationships covered by the prohibition, holding that "The Law, as thus construed, licenses the jury to create its own standard in each case"); being "known to be a member of any gang consisting of two or more persons" (*Lanzetta*, supra); a ban on films deemed to be "of such character as to be prejudicial to the best interests of the people" (*Gelling v. Texas*, 343 U.S. 960 (1925)).

be found? Regional predilections and prejudices, personal distastes either normal or neurotic, private encounters wholly unrelated to military experience, are all set in motion if a man's judgment is to be made guided only by those words. To say they are subjective words is to describe them most moderately. They are more than subjective: they are invitations to the free exercise of whatever private bias the judgment-maker feels most strongly. They are the sole place in the law, civilian or military, when personal whim, caprice and prejudice are beckoned openly to dispose of the essence of a human life.

The Navy used Section 134 in this case to rid itself of Commander Augenblick and disgrace him when more orderly means seemed to fail. The private morality poll conducted by the seven members of the Navy court was light years removed from due process as it is today. The conviction of Avrech and Levy in the emotion-charged period of the Viet Nam War was, similarly, an evocation of deeply-felt views by the members of those courts, left unguided in the imposition of guilt by statute or instruction.

CONCLUSION

By analyzing what occurred to Commander Augenblick, this brief has attempted to aid the Court in its search to determine whether the General Article is to be treated as are criminal statutes generally, or whether special rules are to be pronounced exempting military punishment from this treatment. By examining notice, the ability to defend at trial, proof and vagueness in prosecutions under Article 134, this brief hopes to point

up the constitutional defects that inhere in this statute's application. All but one (the issue of the "lesser included charge" and its impact on notice and the ability to defend) are common to *Avrech*, *Levy* and *Augenblick*. That one facet of the military use of 134 renders *Augenblick*, it is submitted, a more extreme example of constitutional abuse than are the cases before the Court. The tragedy of the matter is, however, that if the Court sanctions the use of the General Article found in *Levy* and *Avrech*, the additional constitutional injury found in *Augenblick* is an inevitable concomitant.

For these reasons, this brief urges the Court to affirm the judgments below in both *Levy* and *Avrech*.

Joseph H. Sharlitt
Counsel to Richard G.
Augenblick

A-1

APPENDIX A

HEADQUARTERS, FIFTH NAVAL DISTRICT
NORFOLK, VIRGINIA

Code 032

5814/1

8 March 1962

A. United States)

v.)

General Court-Martial

Order No. 3-62

Richard G. AUGENBLICK)

Commander)

102649/1100)

U.S. Navy)

Before a general court-martial which convened at the U.S. Naval Station, Washington, D. C., pursuant to an appointing order dated 10 August 1961, was arraigned and tried:

Commander Richard G. AUGENBLICK 102649/1100 U.S. Navy

U.S. Naval Station, Washington, D. C.

CHARGE AND SPECIFICATION

Charge: Violation of the Uniform Code of Military Justice,
Article 125

Specification: In that Commander Richard Gerald AUGENBLICK, U.S. Navy, did at West Basin Drive, Washington, D. C., on or about 12 January 1961, commit sodomy with James O. HODGES, Junior, airman third class, U.S. Air Force.

PLEAS

To the charge and the specification: Not guilty

FINDINGS

Of the charge and the specification:

Not guilty of violation of Article 125 but guilty of violation of Article 134, UCMJ. Of the specification of the charge guilty, except the word "sodomy", substituting therefor the words "an indecent, lewd and lascivious act", and by adding at the end of the specification the words, "by willfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges, of the excepted word, not guilty; of the substituted words, guilty.

SENTENCE

To be dismissed from the service.

The sentence was adjudged on 13 September 1961. No previous convictions were considered.

B. PRES: Could we ask this question: Is there any approximation of the time that will be involved? We have one little connection.

LO: All right, sir, I would assume that the out of court hearing that we will hold now will last beyond 1400. It will last about twenty-five minutes. I don't anticipate any longer.

PRES: Do you have any idea how long the arguments might take?

LO: I am wondering if it would be convenient to say take an out of court hearing now and then we could remain in recess, even though we might conclude the out of court hearing, until you members make any telephone calls or what have you that you might desire to do. Captain, I don't want any member to feel that I am trying to rush you. You certainly shouldn't sit when you need rest, sleep or food. You should certainly have a completely open and free mind.

PRES: We have just one little problem which a member says he can solve and then we are all set.

LO: Fine. All right, we will recess for an out of court hearing which will be attended by counsel, the accused, the reporter and the law officer. The court will recess.

The court recessed at 1335, 12 September 1961.

The out of court hearing was called to order.

LO: Let the record show that the hour is now 1337, the 12th day of September 1961. This is an out of court hearing in the case of United States against Augenblick. Present are the accused, counsel for both sides, the reporter and the law officer, as well as certain spectators.

Gentlemen, I give you this opportunity first before I give the instructions that I propose to give, to receive any specific requested instructions from you and, of course, to receive any arguments on them. But before I proceed I would like to advise you — before I proceed, to advise you of any proposed instructions I may have, that I would like to inquire first of the Government, what if any lesser included offense does the Government feel might be in issue?

C. TC: I haven't given it any thought, as a matter of fact. I suggest that the lesser included offense may include an indecent or lewd act with another, which is indicated at Instruction 149 in the Law Officer's Manual, and possibly indecent assault, both of which would be offenses under Article 134.

LO: Did you mean "indecent assault", Commander? I believe the only indecent assault would be committed on a female.

TC: Well, then, I will withdraw that.

LO: Very well. Does the defense desire to be heard on what they consider being a possible lesser included offense?

IDC (Mr. Kendrick): We certainly would object to a lesser included offense. The charge is sodomy. We think that the evidence has got to show sodomy or nothing and that this proposed lesser included offense that has been suggested by the law officer is not in any way supported by any evidence. And we come back to the basic premise that it's sodomy or it isn't sodomy. It's guilty or not guilty, as I see it.

LO: I believe that should be correctly stated to include the lesser included offense proposed by the "trial counsel."

IDC (Mr. Kendrick): I am sorry. Who did I say?

TC: "Law officer."

IDC (Mr. Kendrick): Oh, I am sorry.

LO: Gentlemen, these are the tentative instructions that I propose to give, and are as follows: I intend to inform the court that your arguments are not evidence, as I have

before, but it may assist the court; that they will consider only the evidence produced here; that any objections which I have sustained or any time that I have ordered some-
this stricken they are to disregard it; that evidence that has been admitted for any limited purpose is considered only for that purpose.

* * * * *

D. A description, I believe, of lips against the penis of another person. If there is mere oral-genital contact without penetration of the organ into the mouth it is not sodomy irrespective of any other consideration. As I have indicated, mere contact is not enough. Penetration is required. However, it is not necessary that an emission occur for the offense of sodomy.

Consent on the part of the alleged victim of sodomy is not an essential element. The offense of sodomy may be committed with or without the victim's consent, or it may be committed by the mutual consent of two persons involved. I believe, under the state of the evidence, that only one lesser included offense may be in issue at this time. However, if during your deliberations you believe that any other lesser included offense may be in issue I ask that you open court, make your feelings known and I will give you further instructions on your inquiry concerning any other lesser included offense. It would be totally improper for you to come forward with a finding of guilty of any lesser included offense on which you had received no instructions whatever. And that lesser included offense, I believe, that may be in issue is that of indecent, lewd or lascivious act with another.

If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the

time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force but which act fell short of sodomy; and two that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of the nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as a violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code.

* * * * *

B-1

APPENDIX B

69-1

DOCKET ENTRIES IN THE SUPREME COURT 39

Richard G. Augenblick, Petitioner,

v.

Title United States

<i>Court</i>	<i>Filing Date</i>	<i>Term & Dkt. No.</i>
United States Court of Claims	September 2, 1969	A-69 551

<i>Date</i>	<i>Proceedings and Orders</i>
	Counsel for petitioner: Joseph H. Sharlitt
	Counsel for respondent:
Jun. 20, 1969	Application for extension of time to file petition for certiorari filed and order granting same. (Warren, C. J., until 9-1-69)
Sept. 2, 1969	Petition for writ of certiorari and record filed.
Sept. 2, 1969	Motion to defer consideration filed.
Sept. 19, 1969	Application for and order extending time to file government's response. (Until 11-3-69)
Oct. 24, 1969	Application (further) for and order further extending time to file response, etc. (time extended pending filing of certiorari to review action of Court of Claims upon motion of July 14, 1969 in that Court)

DOCKET ENTRIES IN THE COURT OF CLAIMS
Since January 14, 1969

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| Feb. 11, 1969 | Order of the Supreme Court, dated January 14, 1969, reversing & remanding this case (and case no. 353-65) filed. Notice to parties. |
| Feb. 12, 1969 | Plaintiff's motion for leave to file first amended petition filed. Copies (2) to deft. |
| Feb. 21, 1969 | Record in re certiorari returned from the Supreme Court. |
| Feb. 24, 1969 | Defendant's opposition to plaintiff's motion to file an amended petition filed. Copies (2) to atty. |
| Feb. 28, 1969 | Plaintiff's motion for leave to file reply to defendant's opposition filed. Copies (2) to deft. ALLOWED Mar. 11, 1969. |
| Mar. 11, 1969 | Plaintiff's reply to defendant's opposition to plaintiff's motion for leave to file amended petition filed. Copies (2) to deft. |
| Mar. 11, 1969 | Defendant's opposition to plaintiff's motion for leave to file a reply to plaintiff's opposition, and in the alternative, for leave to file a response to plaintiff's reply filed. Copies (2) to atty. ALLOWED Mar. 13, 1969. |

B-3

GENERAL Docket Case No. 357-64 AUGENBLICK

Date	Proceedings	Bernhardt
Mar. 13, 1969	Defendant's response to plaintiff's reply to defendant's opposition to plaintiff's motion to file an amended petition filed. Copies (2) to atty.	
Mar. 27, 1969	Plaintiff's motion for leave to file reply filed. Copies (2) to deft. ALLOWED Mar. 28, 1969 and filed.	
Mar. 28, 1969	Plaintiff's reply brief filed. Copies (2) to deft.	
Apr. 4, 1969	Court entered order denying plaintiff's motion for leave to file first amended petition; vacating and withdrawing the judgment entered herein on May 12, 1967 and dismissing plaintiff's petition. Copy to parties.	
Jun. 13, 1969	Plaintiff's application pursuant to Rule 71 (request for record in re certiorari) filed. Copies (2) to deft.	
Jun. 25, 1969	Plaintiff's withdrawal of application pursuant to Rule 71 filed. Copies (2) to deft.	
Jul. 14, 1969	Plaintiff's motion for leave to file second amended petition and for relief under Rule 69(b) filed. Copies (2) to deft.	
Jul. 25, 1969	Defendant's motion for extension of time (to August 24, 1969) to file response to plaintiff's motion for leave to file second	

	amended petition filed. Copies (2) to atty. ALLOWED Aug. 15, 1969.
Jul. 29, 1969	Defendant's motion for extension of time (to August 24, 1969) to file opposition to motion for relief filed. Copies (2) to atty. ALLOWED Aug. 15, 1969.
Aug. 20, 1969	Plaintiff's petition for stay of the court's order of April 4, 1969, denying plaintiff's motion for leave to file first amended petition filed. Copies (2) to deft.
Aug. 25, 1969	Defendant's opposition to plaintiff's motion for relief under Rule 69(b) filed. Copy to atty.
Aug. 25, 1969	Defendant's opposition to plaintiff's motion to file a second amended petition filed. Copies (2) to atty.
Aug. 27, 1969	Defendant's objection to plaintiff's petition for stay of the court's order filed. Copies (2) to atty.
Aug. 28, 1969	Plaintiff's motion for waiver of Rule 71(a) filed. Copies (2) to deft. ALLOWED Aug. 28, 1969 and filed.
Aug. 28, 1969	Plaintiff's application pursuant to Rule 71. filed. Copies (2) to deft. ALLOWED Aug. 28, 1969.
	* * * *
Aug. 29, 1969	Record in re certiorari handed to attorney for plaintiff. \$5 fee paid.

B-5

- Sep. 4, 1969 Plaintiff's reply to defendant's opposition to motion to file a second amended petition, etc., filed. Copies (2) to deft.
- Sep. 5, 1969 Notice of filing in Supreme Court of a petition for writ of certiorari on September 2, 1969, No. 551, October Term, 1969 filed.
- Oct. 31, 1969 Court entered order staying proceedings pending disposition of Supreme Court cases. Copy to parties.
- Feb. 25, 1970 Plaintiff's motion for leave to file notice filed. Copies (2) to deft.
- Mar. 12, 1970 Defendant's notice to court filed. Copies (2) to atty.
- Mar. 4, 1971 Defendant's motion to lift pending stay and/or suspension order, to deny plaintiff's motion for leave to file second amended petition, and to deny relief under Rule 152(b) filed. Copies (2) to atty.
- Mar. 22, 1971 Plaintiff's motion for leave to file motion (for time extension, out of time) filed. Copies (2) to deft. ALLOWED Mar. 26, 1971.
- Mar. 26, 1971 Plaintiff's motion for extension of time (to April 3, 1971) to response to motion to file stay, etc. filed. Copies (2) to deft. ALLOWED Mar. 26, 1971 with no further extension to be granted except for extraordinary circumstances.

Apr. 5, 1971	Plaintiff's response to motion to lift stay, etc., filed. Copies (2) to deft.
Apr. 14, 1971	Defendant's reply to response to motion to lift stay filed. Copies (2) to atty.
Apr. 22, 1971	Plaintiff's motion for leave to file (response to reply filed April 14, 1971) filed. Copies (2) to deft. ALLOWED Apr. 22, 1971.
Apr. 22, 1971	Plaintiff's response to defendant's reply filed. Copies (2) to deft.
Jun. 2, 1971	Argued and submitted on plaintiff's motion for leave to file 2nd Amended Petition and for relief and defendant's motion to lift stay, to deny motion to file 2nd Amended Petition and to deny relief. A Court order will subsequently be entered providing for further briefing by the parties.
Jun. 14, 1971	Court entered order order providing for further briefing as set forth in the order (60-45-30). Copy to parties.
Aug. 6, 1971	Plaintiff's motion for extension of time (to October 12, 1971) to submit brief in compliance with court's order of June 14, 1971 filed. Copies (2) to deft. ALLOWED Aug. 26, 1971 to September 27, 1971, with no extension to be granted except for illness or similar emergency.

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- Aug. 13, 1971 Defendant's opposition to plaintiff's motion to enlarge the time for filing brief filed. Copies (2) to atty.
- Sep. 27, 1971 Plaintiff's brief (submitted pursuant to the Order of the Court of June 14, 1971) filed. Copies (25) to deft.
- Nov. 11, 1971 Defendant's brief pursuant to court order of June 14, 1971 filed. Copies (4) to atty.
- Dec. 13, 1971 Plaintiff's reply brief filed. Copies (4) to deft.
- Dec. 17, 1971 Plaintiff's request for oral argument filed. Copies (2) to deft. ALLOWED Mar. 20, 1972 in that this case is to be placed on an appropriate calendar for oral argument.
- Apr. 28, 1972 Plaintiff's motion to calendar the case for oral argument filed. Copies (2) to deft. DENIED May 5, 1972, without prejudice to reconsideration by the court at a later time.
- Jul. 3, 1973 Plaintiff's motion to calendar case for oral argument filed. Copy to deft. SEE ENTRY of Aug. 17, 1973.
- Jul. 13, 1973 Defendant's response to motion filed July 3, 1973 filed. Copies (2) to atty.
- Jul. 13, 1973 Plaintiff's motion to supplement motion to calendar case for oral argument filed. Copies (2) to deft.

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| Jul. 30, 1973 | Plaintiff's motion for leave to file reply to defendant's response to motion to calendar case for argument filed. Copies (2) to deft. ALLOWED Aug. 16, 1973. |
| Aug. 16, 1973 | Plaintiff's reply to defendant's response to motion to calendar case for argument filed. Copies (2) to deft. |
| Aug. 17, 1973 | Re motion of July 3, 1973: MOTION GRANTED and case placed on the October, 1973 calendar for oral argument; it is further ordered that each party may file a supplementary brief, provided that such briefs shall be filed not later than September 18, 1973 with no additional time for response or reply to the brief of the adverse party, and provided further that such briefs shall be limited to a discussion of the cases that have been decided and the material developments that have occurred since the former briefs of the parties were filed herein. |
| Sep. 17, 1973 | Defendant's supplementary brief filed. Copies (13) to atty. |
| Sep. 18, 1973 | Plaintiff's supplementary brief filed. Copies (13) to deft. |
| Sep. 24, 1973 | Court entered an order removing case from the October 1973 calendar filed. Copy to parties. |

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B-9

Oct. 3, 1973	Plaintiff's motion for reconsideration of the court's order of Sep. 24, 1973 filed. Copies (2) to deft.
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Oct. 12, 1973	Defendant's response to motion file October 3, 1973 filed. Copies (2) to atty.
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APPENDIX C

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(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. In that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

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INDEX

	Page
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED.....	
STATEMENT.....	
SUMMARY OF ARGUMENT.....	24
ARGUMENT.....	34
I. This Court Does Not Have Jurisdiction to Hear This Cause Because of the Government's Failure to Perfect the Appeal.....	34
II. The Prosecution for Pure Speech Violated the First Amendment. There Was No Evidence to Prove the Offenses.....	40
III. The Conviction Violated the Due Process Clause of the Fifth Amendment Since There Was No Evidence to Prove the Necessary Elements of the Pure Speech Charges.....	44
A. Charge II (Under Article 134).....	45
B. Additional Charge I (Under Article 133).....	51
IV. The Rejection of Truth as a Defense to Pure Speech Charges Arising from Comments on the Conduct of the Vietnam War and War Crimes Resulted in the Deprivation of First, Fourth, Fifth and Sixth Amendment Rights.....	52
V. The Order to a Medical Officer to Train Special Forces Aidmen Was Violative of Accepted Standards of Medical Ethics and in Violation of the First, Third, Fourth, Fifth, and Ninth Amendments.....	55

INDEX (Continued)

	Page
VI. The Defense to the Order Charge That Special Forces Aidmen Were Committing War Crimes Was Erroneously Excluded by the Law Officer.....	62
VII. There Is No Military Necessity nor Constitutional Justification for Not Providing the Accused in Military Trials the Same Right of Review of Constitutional Errors as Is Available to Civilians....	67
VIII. The General Articles Are Not Supportable Under the First and Fifth Amendments. There Is No Military Need or Necessity Justifying Infringement of the Rights Guaranteed Thereby. The Record Here Illustrates the Constitutional Defects.....	71
A. The General Articles Are Unconstitutional.....	71
B. There Is No Compelling Need to Permit Special Exceptions Based on the Military Justice Code.....	86
C. The Utilization of the General Article Clearly Indicates That It is Not Needed.....	89
IX. The Statutes Should Be Held Void on Their Face to Prevent Violation of the First and Fifth Amendments. Additionally, the Void for Vagueness Doctrine Is Necessarily Applicable Because of the Limited Review of Military Prosecutions.....	92
X. Dr. Levy's Prosecution Was Selective and Involved the Unequal Application of Military Law. The Conviction on Each Charge Violated the First and Fifth Amendments.....	96

INDEX (Continued)

	Page
XI. The Governmental Failure to Provide Dr. Levy With the Training Required and Provided Other Officer-Physicians Voids His Prosecution. It Denied Him the Opportunity to Gain Knowledge of the Customs of the Service.....	100
XII. The Failure to Disclose Evidence Denied Dr. Levy a Fair Trial	102
A. The Failure to Disclose the Entire G-2 Dossier to the Defense Was a Violation of the First, Fourth, Fifth and Sixth Amendments.....	102
B. The Failure to Require the Disclosure of Questionnaires Prepared by the Government Deprived Dr. Levy of a Fair Hearing.....	107
C. Appellee Was Entitled to the Disclosure of Information Obtained by Electronic Surveillance.....	108
XIII. The Article 90 Charge Should Remain Reversed Regardless of the Disposition of the Pure Speech Charges.....	109
XIV. The Military Forum in Which Dr. Levy Was Tried Was Constitutionally Defective.....	116
Conclusion.....	126

TABLE OF AUTHORITIES

Cases:	Page
<i>Abrams v. United States</i> , 250 U.S. 616 (1919) ..	25, 41
<i>Alderman v. United States</i> , 394 U.S. 165 (1969)	31, 106, 108
<i>Anderson v. Dunn</i> , 19 U.S. (6 Wheat.) 204, 5 L.Ed. 242 (1821)	68
<i>Andres v. United States</i> , 333 U.S. 740 (1948)	120
<i>Anglo-California Trust Co. v. Oakland Rys.</i> , 191 Cal. 387, 216 P. 578 (1923)	39
<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)	120
<i>Avery v. Georgia</i> , 345 U.S. 559 (1953)	118, 124
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	50
<i>Bates v. Little Rock</i> , 361 U.S. 516 (1960)	42
<i>Bowie v. City of Columbia</i> , 378 U.S. 347 (1964) ..	28, 81
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	31, 104, 106, 107
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	28, 29, 92
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	
<i>Burns v. Wilson</i> , 346 U.S. 137 (1953)	33, 117
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) ...	26, 60
<i>Carmichael v. Allen</i> , 267 F. Supp. 985 (N.D. Ga. 1967)	75
<i>Carter v. McClaghry</i> , 183 U.S. 365 (1902)	69
<i>Castro v. United States</i> , 70 U.S. (3 Wall.) 46 (1866)	35, 36

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>Clay v. United States</i> , 403 U.S. 698 (1971).....	26, 59
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971) ..	95
<i>Commercial Pictures Corp. v. Regents of University of New York</i> , 346 U.S. 587 (1954).....	75
<i>Communist Party v. Subversive Activities Control Board</i> , 367 U.S. 1 (1961).....	43
<i>Connolly v. General Construction Co.</i> , 269 U.S. 385 (1926).....	94
<i>Cool v. United States</i> , 409 U.S. 100 (1972).....	123
<i>Cross v. United States</i> , 335 F.2d 987 (D.C. Cir. 1964).....	110
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970).....	34, 125
<i>Dash v. Commanding General</i> , 307 F. Supp. 849 (D.S.C. 1969), <i>aff'd</i> , 429 F. 2d 427 (4th Cir. 1970).....	97, 98
<i>DeGregory v. New Hampshire</i> , 383 U.S. 825 (1966).....	25, 40, 43
<i>Dennis v. United States</i> , 341 U.S. 494 (1951).....	40, 43, 54
<i>Dickey v. Florida</i> , 398 U.S. 30 (1970).....	116
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973).....	59
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965).....	94
<i>Dynes v. Hoover</i> , 61 U.S. (20 How.) 65 (1858)....	68
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	59, 94
<i>Estes v. Texas</i> , 381 U.S. 532 (1965).....	32, 114, 125
<i>Fields v. City of Fairfield</i> , 375 U.S. 248 (1963)....	45
<i>Fletcher v. United States</i> , 26 Ct. Cl. 541 (1891)....	69

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>Garner v. Louisiana</i> , 368 U.S. 157 (1961).....	24, 44
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	25, 52
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966).....	50
<i>Gibson v. Florida</i> , 372 U.S. 539 (1963).....	42
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	123
<i>Giles v. Maryland</i> , 386 U.S. 66 (1967).....	106
<i>Gillette v. United States</i> , 401 U.S. 437 (1971).....	59
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)....	25, 50, 94
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	28, 76, 94
<i>Gregory v. City of Chicago</i> , 394 U.S. 111 (1969)....	45
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956).....	123
<i>Griffin v. United States</i> , 336 U.S. 704 (1949), on remand, 183 F.2d 990 (D.C. Cir. 1950).....	32, 106, 108
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	26, 59, 61
<i>Groppi v. Wisconsin</i> , 400 U.S. 505 (1971)....	34, 125
<i>Hamilton v. Alabama</i> , 368 U.S. 52 (1961).....	122
<i>Harmon v. Brucker</i> , 355 U.S. 579 (1958).....	31, 105
<i>Hartford Accident & Indemnity Co. v. Bunn</i> , 285 U.S. 169 (1932).....	36
<i>Healy v. Edwards</i> , 363 F. Supp. 1110 (E.D. La. 1973), appeal docketed <i>sub nom.</i> <i>Edwards v. Healy</i> , 42 L.W. 3307 (No. 73-759, Nov. 12, 1973).....	117
<i>Hernandez v. Beto</i> , 443 F.2d 634 (5th Cir. 1971)...	123
<i>Herndon v. Lowry</i> , 301 U.S. 242 (1937).....	50, 94

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>In re Hultin's Estate</i> , 29 Cal. 2d 825, 178 P. 2d 756 (1947).....	39
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	115, 125
<i>Jackson v. Jackson</i> , 71 Cal. App. 2d 837, 163 P. 2d 780 (1945).....	39
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	75
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967).....	93
<i>Kingsley Int'l Pictures Corp. v. Regents of University of New York</i> , 360 U.S. 684 (1959)...	75
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946).....	32, 117
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939)...	28, 85
<i>Lenske v. United States</i> , 383 F.2d 20 (9th Cir. 1967).....	31, 105
<i>Levin v. Clark</i> , 408 F.2d 1209 (D.C. Cir. 1967).....	32, 107
<i>Lery v. Corcoran</i> , 389 F.2d 929 (D.C. Cir. 1967), stay and cert. denied, 387 U.S. 915, 389 U.S. 960 (1967).....	21, 85
<i>Lery v. Dillon</i> , 286 F. Supp. 593 (D. Kan. 1968) aff'd 415 F.2d 1263 (10th Cir. 1969).....	22
<i>Lery v. Parker</i> , 396 U.S. 1204, 396 U.S. 804 (1969).....	21
<i>Lery v. Parker</i> , 316 F. Supp. 473 (M.D. Pa. 1970)...	109
<i>Lery v. Resor</i> , Civ. No. 67-442 (D. S.C.; July 5, 1967), aff'd per curiam, 384 F.2d 689 (4th Cir. 1967), cert. denied, 389 U.S. 1049 (1968).....	21

TABLE OF AUTHORITIES (Continued)

Cases—Continued:

	Page
<i>Levy v. Resor</i> , 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).....	21
<i>MacDonald v. Hodson</i> , 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970).....	122
<i>Marsh v. Alabama</i> , 326 U.S. 501 (1946).....	41
<i>Marshall v. United States</i> , 360 U.S. 310 (1959)...	125
<i>Ex Parte Milligan</i> , 71 U.S. (4 Wall.) 2 (1866)...	117
<i>Molignaro v. Smith</i> , 408 F.2d 795 (5th Cir. 1969).....	31, 104
<i>Monger v. Shirley</i> , 131 U.S. Appendix cx, 20 L.Ed. 635 (1872).....	35
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935)....	104, 107
<i>Morissette v. United States</i> , 342 U.S. 246 (1952) ..	25, 55
<i>Musser v. Utah</i> , 333 U.S. 95 (1948).....	43
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)....	42, 94
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	29, 86
<i>Nardone v. United States</i> , 302 U.S. 379 (1937)...	106
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	25, 52
<i>Norwell v. City of Cincinnati</i> , ____ U.S. ____, 94 S.Ct. 187 (1973).....	94
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1969).....	27, 67, 117
<i>In Re Oliver</i> , 333 U.S. 257 (1948).....	33, 122
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972).....	94
<i>Patton v. United States</i> , 281 U.S. 276 (1930)....	120

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968).....	124
<i>Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.</i> , 385 U.S. 32 (1966), rehearing denied, 385 U.S. 995 (1966).....	37
<i>Plummer v. City of Columbus</i> , ____ U.S. ____, 94 S.Ct. 17 (1973).....	94
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961).....	61
<i>Pointer v. United States</i> , 151 U.S. 396 (1894).....	109, 112
<i>Prince v. Commonwealth of Massachusetts</i> , 321 U.S. 158 (1944).....	60
<i>Pyle v. State of Kansas</i> , 317 U.S. 213 (1942).....	104, 107
<i>Ex Parte Quirin</i> , 317 U.S. 1 (1942).....	69, 117
<i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	passim
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963).....	115, 125
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	55
<i>Schenck v. United States</i> , 249 U.S. 47 (1919).....	25, 43, 49, 54
<i>Secretary of the Navy v. Avrech</i> , No. 72-1713 (Oct. Term. 1973).....	24
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	34, 120, 125
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	26, 27, 59
<i>Smith v. Whitney</i> , 116 U.S. 167 (1886).....	27, 68
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	87
<i>Spomer v. Littleton</i> , ____ U.S. ____, 94 S.Ct. 685 (1974).....	38
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	59
<i>Stolte v. Laird</i> , 353 F. Supp. 1392 (D. D.C. 1972).....	49, 97

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1880).....	33, 117
<i>Street v. New York</i> , 394 U.S. 576 (1969).....	76
<i>Stroble v. California</i> , 343 U.S. 181 (1952).....	115
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)...	28, 85
<i>Stump v. Bennett</i> , 398 F.2d 111 (8th Cir.), cert. denied, 393 U.S. 1001 (1968).....	110
<i>Swaim v. United States</i> , 165 U.S. 553 (1897).....	69
<i>Swarb v. Lennox</i> , 405 U.S. 191 (1972).....	34, 125
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)...	41
<i>Taggart v. New York</i> , 392 U.S. 667 (1968).....	37
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949).....	28, 41, 75, 76
<i>Territo v. United States</i> , 358 U.S. 279 (1959).....	36
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	26, 59
<i>Thompson v. City of Louisville</i> , 362 U.S. 199 (1960).....	24, 45
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940).....	94
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969).....	96
<i>Turner v. Fouche</i> , 396 U.S. 346 (1970).....	118
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965)...	115, 125
<i>United States v. Augenblick</i> , 393 U.S. 348 (1969)...	107
<i>United States v. Brown</i> , 381 U.S. 437 (1965).....	119
<i>United States v. Batchelor</i> , 19 C.M.R. 452 (ABR 1955).....	80

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>United States v. Cotton</i> , 397 U.S. 45 (1970)	37
<i>United States v. Crawford</i> , 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964)	117
<i>United States v. Daniels</i> , 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970)	81
<i>United States v. Evans</i> , 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967)	27, 65
<i>United States v. Fletcher</i> , 148 U.S. 84 (1893)	68
<i>United States v. Frantz</i> , 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953)	77, 78
<i>United States v. Gainey</i> , 380 U.S. 63 (1965)	55
<i>United States v. Harvey</i> , 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970)	49, 81
<i>United States v. Howe</i> , 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967)	46
<i>United States v. Kuefler</i> , 14 U.S.C.M.A. 136, 33 C.M.R. 348 (1963)	65, 66
<i>United States v. Lee</i> , 4 C.M.R. 185 (ABR) pet. for review den., 4 C.M.R. 173 (1952)	90
<i>United States v. Levy</i> , 39 C.M.R. 672 (ABR 1968), pet. for review denied, 18 U.S.C.M.A. 627 (1969)	21, 80
<i>United States v. Macintosh</i> , 283 U.S. 605 (1931)	61
<i>United States v. McCormick</i> , 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960)	28, 79
<i>United States v. McLeod</i> , 385 F.2d 734 (5th Cir. 1967)	31, 105

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>United States v. Mississippi</i> , 380 U.S. 128 (1965) . .	118
<i>United States v. Moore</i> , 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966)	65
<i>United States v. National Dairy Corp.</i> , 372 U.S. 29 (1963)	92
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968) . .	41, 42
<i>United States v. Priest</i> , 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972)	25, 49, 50
<i>United States v. Reese</i> , 92 U.S. 214 (1876)	28, 85
<i>United States v. Romano</i> , 382 U.S. 136 (1965)	55
<i>United States v. Sadinsky</i> , 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964)	70
<i>United States v. Samuels</i> , 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959)	122
<i>United States v. Seeger</i> , 380 U.S. 163 (1965) . . .	26, 60
<i>United States v. Shaw</i> , 9 U.S.C.M.A. 267, 26 C.M.R. 47 (1958)	60
<i>United States v. Thirty-Seven (37) Photographs</i> , 402 U.S. 363 (1971)	94
<i>United States ex rel. Toth v. Quarles</i> , 350 U.S. 11 (1955)	67, 70
<i>United States v. Wade</i> , 388 U.S. 218 (1967)	107
<i>United States C. Serv. Comm'n v.</i> <i>National Ass'n of Let. Car.</i> , 413 U.S. 548 (1973)	28, 30, 43, 92
<i>Wainwright v. Stone</i> , ____ U.S. ____, 94 S.Ct. 190 (1973)	80
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973)	115
<i>West Virginia Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943)	30, 67, 99
<i>Whelchel v. McDonald</i> , 340 U.S. 122 (1950) .	27, 55, 66

TABLE OF AUTHORITIES (Continued)

Cases—Continued:	Page
<i>White v. Crook</i> , 251 F. Supp. 401 (M.D. Ala. 1966).....	33, 117
<i>White v. Maryland</i> , 373 U.S. 59 (1963).....	33, 122
<i>Whitney v. California</i> , 274 U.S. 357 (1927)....	41, 43
<i>Whitus v. Balkcom</i> , 333 F.2d 496 (5th Cir. 1964).....	110, 121
<i>Whitus v. Georgia</i> , 385 U.S. 545 (1967).....	33, 117
<i>Williams v. Georgia</i> , 349 U.S. 375 (1955).....	118
<i>Williams v. United States</i> , 168 U.S. 382 (1897).....	109, 112
<i>Williams v. United States</i> , 131 F.2d 21 (D.C. Cir. 1942).....	115
<i>Winters v. New York</i> , 333 U.S. 507 (1948).....	94
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....	31, 106
<i>Wood v. Georgia</i> , 370 U.S. 375 (1962).....	43
<i>In Re Yamashita</i> , 327 U.S. 1 (1946).....	27, 64, 66
<i>Yates v. United States</i> , 354 U.S. 298 (1957)....	25, 54
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	30, 99
 Constitution:	
Article III.....	96
First Amendment.....	19, 59, 88, 102
Fourth Amendment.....	19, 102
Fifth Amendment.....	19, 102
Sixth Amendment.....	19, 102
Ninth Amendment.....	19

TABLE OF AUTHORITIES (Continued)

Statutes and Rules:	Page
10 U.S.C. §3791.....	21
10 U.S.C. §3795.....	21
18 U.S.C. §3500.....	32, 106
28 U.S.C. §451.....	35
28 U.S.C. §1252.....	24, 34, 35, 37
28 U.S.C. §2101.....	24, 37, 40
28 U.S.C. §2103.....	24, 37
50 U.S.C. App. §456.....	9, 10
Act of August 24, 1937, Ch. 754, 50 Stat. 752....	35
Rule 33.3(c), Revised Rules of the Supreme Court of the United States.....	22, 34
Rule 41, Federal Rules of Appellate Procedure....	23
Rule 8(a), Federal Rules of Criminal Procedure.....	33, 111
Uniform Code of Military Justice:	
Article 6, U.C.M.J., 10 U.S.C. §806.....	124
Article 15, U.C.M.J., 10 U.S.C. §815....	18, 103, 115
Article 25, U.C.M.J., 10 U.S.C. §825....	116, 117, 118
Article 32, U.C.M.J., 10 U.S.C. §832.....	33, 118, 121, 122
Article 34, U.C.M.J., 10 U.S.C. §834.....	120
Article 36, U.C.M.J., 10 U.S.C. §836....	33, 79, 111
Article 41, U.C.M.J., 10 U.S.C. §841.....	120, 121
Article 52, U.C.M.J., 10 U.S.C. §852.....	120
Article 56, U.C.M.J., 10 U.S.C. §856.....	79, 90
Article 67, U.C.M.J., 10 U.S.C. §867.....	27, 70
Articles 77-132, U.C.M.J., 10 U.S.C. §§877-932....	88

TABLE OF AUTHORITIES (Continued)

Uniform Code of Military Justice—Continued:		Page
Article 88, U.C.M.J., 10 U.S.C. §888.....		29
Article 90, U.C.M.J., 10 U.S.C. §890.....	<i>passim</i>	
Article 92, U.C.M.J., 10 U.S.C. §892.....		88
Article 133, U.C.M.J., 10 U.S.C. §933.....	<i>passim</i>	
Article 134, U.C.M.J., 10 U.S.C. §934.....	<i>passim</i>	
 Other Authorities:		
ABA Standards Relating to a Fair Trial and Free Press (1968).....		125
AMA Principles of Medical Ethics of the American Medical Association, Opinions and Reports of the Judicial Council, VI-VII (1964).....		57
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Army Regulation 40-1, ¶9-B.....		116
Army Regulation 40-554, ¶5.....		58
Army Regulation 600-20, ¶42.....		46, 47
Boskey and Gressman, The 1970 Changes in the Supreme Court's Rules, 90 S.Ct. 2337.....		36
4A C.J.S. Appeal and Error, §§ 591, 593(10).....		40
Carroll, ALICE'S ADVENTURES IN WONDERLAND, AND THROUGH THE LOOKING GLASS (Aimont Pub. Co. Ed., 1965).....		84
81 CONG. REC. 3254-73, 8507-15 (1937).....		36
Cook, THE WARFARE STATE, Ch. 4, "Madison Avenue in Uniform" (The MacMillan Co., New York, 1962).....		98

TABLE OF AUTHORITIES (Continued)

Other Authorities—Continued:	Page
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Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 HARV. L. REV. 293 (1957)	41
H.R. Rep. No. 212, 75th Cong. 1st Sess. (1937)	36
H.R. Rep. No. 1490, 75th Cong. 1st Sess. (1937)	36
Note, Judicial Checks on Command Influence Under the Uniform Code of Military Justice, 63 YALE L. J. 880 (1954)	119
THE LAW OF LAND WARFARE, Field Manual (FM) 27-10 (1956)	27, 63
THE LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES (1951)	55, 72, 79
MANUAL FOR COURTS-MARTIAL UNITED STATES (1951)	<i>passim</i>
MANUAL FOR COURTS-MARTIAL UNITED STATES (1969)	<i>passim</i>
Military Justice Evidence, DA PAM 27-172 (June 1962)	60
Mollenhoff, THE PENTAGON (1967)	98
Morgan, The Background of the Uniform Code of Military Justice, 6 VAND. L. REV. 169 (1953)	119
Moyer, JUSTICE AND THE MILITARY (Public Law Education Institute: Washington, D.C. 1972)	89

TABLE OF AUTHORITIES (Continued)

Other Authorities—Continued:	Page
Oath of Hippocrates.....	55
O'Brien, A TREATISE ON AMERICAN MILITARY LAWS (1846).....	72
Sherman, <i>Military Justice Without Military Control</i> , 82 YALE L. J. 1398 (1973)...	70
Shoup, "The New American Militarism," <i>The Atlantic</i> (April 1969).....	98
S. Rep. No. 963, 75th Cong., 1st Sess. (1937).....	36
Stern and Gressman, SUPREME COURT PRACTICE (4th Ed. 1969).....	36
Note, Taps for the Real Catch-22, 81 YALE L. J. 1518 (1972).....	86
Task Force on the Administration of Military Justice in the Armed Forces (1972).....	88
T. B. Med. 230, Treatment and Management of Venereal Disease, §13d(2) (7 July 1965)...	57, 58
U. S. Medicine, Vol. 3, No. 14 (July 15, 1967).....	9
Warren, The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181 (1962).....	40, 41
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States
Penitentiary, Lewisburg, Pennsylvania, and STAN-
LEY R. RESOR, as Secretary of the Army,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

BRIEF OF APPELLEE

QUESTIONS PRESENTED

In addition to those questions stated by the Govern-
ment on page 3 of its brief:

1. Whether, regardless of the constitutionality of
Articles 133 and 134, appellee was denied his constitu-
tional rights and a fair trial on the Article 90 charge
and on the speech charges, Articles 133 and 134.

2. Whether the Constitution requires that military
personnel receive the same constitutional rights as
civilians.

STATEMENT

Appellee, Dr. Howard B. Levy, then a Captain in the United States Army, was tried and convicted for "conduct unbecoming an officer and a gentleman," Article 133, UCMJ, 10 U.S.C. §933, for violating the "General Article," Article 134, UCMJ, 10 U.S.C. §934, and for "willfully disobey[ing] a lawful command," Article 90, UCMJ, 10 U.S.C. §890.¹ Two of the five charges (the "letter charges") were dismissed at the request of the prosecutor after the court had found Dr. Levy guilty, the law officer instructing the court "not to consider those [letter charges] in any way and then dismiss [them] from your mind in deliberating upon and deciding the sentence in this case." A. 648.

Dr. Levy's sentence by concurrence of "two-thirds of the members present at the time the vote was taken" was general and not severable as to the specific charges against him.² The sentence was dismissal from the ser-

¹ Dr. Levy was charged as follows: Charge I, Article 90 (for disobedience of order to train Special Forces personnel); Charge II, Article 134 (for statements to enlisted men about the war in Vietnam designed to promote disloyalty and disaffection among the troops); Additional Charge I, Article 133 (for making intemperate, defamatory, provoking and disloyal statements to divers persons at divers times constituting conduct unbecoming an officer and a gentleman); Additional Charge II, Article 133 (for writing a letter to a sergeant critical of American involvement in Vietnam constituting conduct unbecoming an officer and a gentleman); Additional Charge III, Article 134 (for writing a letter to a sergeant with intent to cause disloyalty). The Article 90 Charge is found at App. 7. Charge II and Additional Charges I through III are set out at App. 7-11. *The following abbreviations are employed herein: for references to the printed Appendix, "App."; for the Jurisdictional Statement Appendix, "J.S.A."; for the more often referred to three-volume xeroxed Appendix, "A"; and for the Record of the Court-Martial, "R. Vol. _____, p. _____."*

² The court, during deliberations, sought an additional instruction regarding the elements of proof of the letter charges. A. 640. (footnote continued on next page)

vice, forfeiture of all pay and allowances and confinement at hard labor for three years. A. 651.

The prosecutor had relied on the letter, which was the sole basis for the two letter charges, by referring to and quoting from it during closing argument.³ R. Vol. 9, pp. 2554-56.

(footnote continued from preceding page)

Concerning Dr. Levy's intent in writing the letter, no conduct being charged, the Law Officer told them:

... the letter need not have resulted in the intended effect—that is, the actual interference with, impairment and influence on the loyalty, morale, and discipline of the military forces ... but the statements contained in the letter must have had a natural and reasonable tendency to do so. If the intent ... is present, the fact that a communication was sent to only one member of the United States Forces does not remove such act from the conduct denounced by the statute.

Now, lesser included ... is an offense as charged substituting gross negligence for this specific intent ... *Id.* at A. 641.

The court-martial finding him guilty of "culpable negligence" on the letter charges, returned a guilty verdict on them. *Id.* at A. 645. On the following day the letter charges were dismissed on the ground that the court's finding was "tantamount to findings of not guilty." *Id.* at A. 646.

³ For example:

"But why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again, all over the world, and you are helping them. You, Sergeant Hancock. You are no better than a killer. Why? No doubt you know about the terror the whites have inflicted upon the Negroes in our country. Aren't you guilty of the same thing with regard to the Vietnamese? A dead woman is a dead woman in Alabama and in Vietnam. To destroy a child's life in Vietnam equals a destroyed life in Harlem. For what cause?" And a series of epithets. Bull shit. This is a dialogue as the defense suggested? This is a calculated design. Gentlemen of the court, the Government's position in this case is not a position that says that Captain Levy cannot express opposition to the United States war effort, we are discussing. Everyone is entitled to his opinion. This is more than that. That letter goes beyond that. That letter is a calculated designed effort to affect one man he knew about who is in Vietnam. ... R. Vol. 9, p. 2556.

Four of the five charges, including the letter charges—all Article 133 and 134 charges (sometimes collectively referred to as “the speech charges”)—were based on pure speech, no conduct being alleged or proved. The other charge (the Article 90 charge sometimes referred to as “the order charge”) was based on Dr. Levy’s refusal to obey an order to provide medical training to Special Forces Aidmen who are cross-trained in combat skills.

There was never a question regarding Dr. Levy’s training of *medical personnel*. He was a good teacher who willingly trained those in the *medical field*. See A. 437. Nor was there any question about whether he would train everyone, “medical personnel” or not, “combat troops” or not, in “first aid.” But Special Forces sought to learn “[m]uch more than simple first aid.” R. Vol. 13, p. 294; see *id.* at 294-98, 313-16; A. 569-76.

Special Forces and Special Forces Aidmen⁴

Special Forces were “[s]ort of an elite corps,” with a GT score (measure of intelligence) “higher generally for special forces than others.” R. Vol. 4, p. 721.

⁴ As the Review of the Staff Judge Advocate put it:

The approximate objectives of the Special Forces are: (a) To plan and conduct unconventional warfare operations in areas not under friendly control; (b) to organize, equip, train, and direct indigenous forces in the conduct of guerrilla warfare; (c) to train, advise, and assist indigenous forces in the conduct of a [*sic*] counter-insurgency and counterguerrilla operations in support of United States cold war objectives; and (d) to perform such other Special Forces missions as may be inherent in or essential to the primary mission of guerrilla warfare. *The decision to evacuate patients or abandon patients is that of the commanding officer and not of the individual Special Forces aidman. The Special Forces aidman is basically a soldier first and an aidman second.* A.1254. [Emphasis added.] See also A. 504.

Its basic fighting unit, an A-Team, consists of twelve men, each of whom is a cross-trained specialist in at least two and hopefully more guerrilla skills. A. 505. On each A-Team there is an officer in charge, a second officer in charge, and an operations and intelligence sergeant. There are two aidmen,⁵ demolitions men, weapons sergeants, and communications men. The twelfth man comes from one of these specialties. R. Vol. 2, p. 64.

In South Vietnam there were 72 A-Teams, approximately ten B-Teams and four C-Teams. A. 509. Each B-Team has under it several A-Teams and each C-Team has under it several B-Teams. B-Teams may have physicians assigned to them; A-Teams do not. R. Vol. 4, pp. 574-75.

The "[s]pecial forces trooper is basically a soldier" said Colonel Roger A. Juel, who was in overall charge

⁵ Special Forces Aidman cross-training includes:

a. "... [A]mbush. ... [H]ow to make different types of bombs, shotguns, etc. To set off, usually in a circle-type defense, to trap people in the center." R. Vol. 2, p. 24.

b. "... [H]ow to set a charge, how to ignite a charge, how to set up an ambush, and a few ... just little old bombs, a few types of bombs and explosives you can make." *Id.* at 10. [Ellipsis in original.]

c. Use of "anti-personnel mines," *id.* at 25, "[d]emolitions," "[e]ngineering, weapons, commo," *id.* at 109, "M-60 machine gun, 50 calibre machine gun, automatic rifle," *id.* at 60.

d. "[T]actics and techniques," *id.* at 68.

e. "... [C]ivil projects to try and build churches and things they need. Not bring them to our way of thinking if they didn't want to come, but to help them in their own life." *Id.* at 43.

[R. Vol. 2 contains the two reports of the Article 32 investigating officer. Cites herein are to pages of the transcript contained in the report of February 1, 1967.]

of Special Forces Aidman training, R. Vol. 5, p.930, "and an aid man as a secondary occupation." ⁶ A. 506.

Their average GT score, higher than "the average for OCS" is comparable to an I.Q. score of 127. A. 501-503. To enter the Aidman program they must:

have a GT score of 110, which is ten points above the GT score asked for for [sic] other Special Forces volunteers. We feel that the higher intelligence of these people adds to their trainability. During the time they're there besides the GT score, we find that because they are volunteers, they have a higher motivation than I've seen in most other troops, indeed in many of the students I've seen in other schools. R. Vol. 8, p. 2466.

They "have been one of the greatest weapons we have had against communist subversion and this is particularly true to Vietnam." A. 508. Theirs is the most important part of special forces work. *Id.*

By the nature of their work they are often on combat patrols. A. 504. Thus a conscientious objector could be

⁶ Although during the early stages of the trial Special Forces Aidmen had been presented as medical personnel due to their numerical "MOS" classification as medics, this contention was later dropped. Indeed, during the trial the Army issued the following release:

The following answers to questions posed by members of the press were supplied by the Information Office, U.S.A., Special Warfare Center, JFK, Fort Bragg.

Q. If Special Forces aid men are captured do you expect them to be treated as medics or combat troops?

A. Combat troops.

Q. Do they carry arms?

A. Most assuredly.

Q. Are their ID cards specially annotated to reflect that they are medics as opposed to combat soldiers?

A. No, they are not so annotated. R. Vol. 18, Exh. 22. See also R. Vol. 7, pp. 2011-17.

a medic but not an Aidman since Aidmen kill. A. 505-06; see also A. 516-17. Indeed, they sometimes use sodium pentothal on prisoners, A. 509-10, for there is no way "... to fight guerrilla warfare by the rules." A. 511. Even assassination "... is an integral part of guerrilla warfare just as is medical people trying to help the people of an area to win the hearts and minds of the people." A. 511.

They must have medical training for "... it's part of their job when you got twelve Americans and five hundred indigenous people, those Americans have to do everything." A. 515.

Aidmen do "... very little treatment of the Americans, most superficial of basic treatment. If it was anything requiring serious treatment, he [the American] would be evacuated where he would be treated by doctors. ... [T]he major portion of his [the Aidman's] ... practice of medicine, would be the treatment of local civilians. ..." A. 519.

Special Forces Aidmen are engaged in "a political use of medicine; certainly its effects are political," according to Colonel Richard L. Coppedge, formerly Chief Surgeon for the Special Forces' Warfare Center, who originated the Aidman program. "The motives of those who engage in it may differ." ⁷ A. 559.

⁷ He did not:

... see anything incompatible really in the humanitarian aims of this program and the political aims of the program and the military aims of the program. Some people might object to medicine being prostituted to political purposes, but I don't see it that way. I see us in medicine as using the politicians for our purposes which are purely humanitarian, and why not? At the same time we assume, we in the service assume that we are pursuing the right policy and is the proper one. [sic] A. 561.

The Staff Judge Advocate summarizing Colonel Coppedge's testimony said that the Vietnam war "was in many respects a social war in which social instruments such as medicine would have to be utilized." So "we sought to use medicine as a means of approaching the enemy and imposing our will upon his. . . . This is a political use of medicine." ⁸ A. 1261.

Former Special Forces Sergeant Donald Duncan put it more succinctly:

... [T]he one great "in" that you have is this medic [Special Forces Aidman] because people are short on doctors and trained medical personnel in there; that the thing to do is sort of push a medic up there in front and let him get the confidence of these people by treating them; usually it starts off —sometimes it starts off very slow, but the word gets around. More and more people are coming for this treatment; certain dependency is sometimes involved; then, of course, this lays the way open now for the rest of the team to come in and orga-

⁸ The more complete quote follows:

With the advent of the Vietnam war the mission of the Special Forces changed somewhat; there were more counter-guerrilla forces than there were guerrilla forces. It became recognized that the struggle was more than a matter of weapons, that the struggle was in many respects a social war in which social instruments such as medicine would have to be utilized. So "we sought to use medicine as a means of approaching the enemy and imposing our will on his." This is a peculiarly American approach and is opposed to the Viet Cong approach which is more likely to be terroristic. This is a political use of medicine. Colonel Coppedge believes that in the next fifteen or twenty years we will see people like the Special Forces medic employed by the physician as his assistant in the practice of civilian medicine. When the Special Forces aidman training program was established, there was quite a great deal of opposition. There was an attempt to explain to physicians what Special Forces aidmen were and what they were doing. Colonel Coppedge and Colonel Juel made trips to all the hospitals which were expected to carry out a certain part of the training. A. 1261.

nize them in their primary mission which could be border surveillance; it could be CIDG strike force; it could be regional forces, popular forces.

That is part of the medical program in that this is the propaganda value of the medical program.⁹
A. 520.

Appellee's Military Training and His Entry into the Service

Dr. Levy entered active duty on July 9, 1965. Subject to the Doctors' Draft he entered the Army under the "Berry Plan."¹⁰ He was assigned to the United

⁹ The use of medicine as a weapon has become an openly admitted military policy; a recommended technique to gain the confidence of a guerrilla force is establishment of a medical facility to provide limited treatment to noncombatant people. Field Manual (FM) 31-21, ¶ 52. On July 15, 1967, 3 *U.S. Medicine*, No. 14 (a government publication distributed to Army doctors and medical installations) bore on its cover a picture captioned "Green Beret Medic PFC Donald E. Bradshaw on duty with Army exhibit at AMA meeting in Atlantic City," along with the legend, "MEDICINE AS A WEAPON," giving the title of an article on page 3 as, "In the War to Win Men's Minds Medicine Can Be Considered to be a Weapon." In the words of FM 31-21: "Within the limitations of resources available, operations initiated primarily for their psychological effects may include—(1) Supporting the civilian population by sharing medical services and supplies." *Id.* For examples of Aidmen discussing the political use of medicine see R. Vol. 2, pp. 109-109a; R. Vol. 7, p. 2154. Indeed, medicine is even used as a form of money, a barter item. See R. Vol. 7, p. 2201.

¹⁰ Under the "Berry Plan" physicians were, during the completion of their residencies, technically reservists prior to active duty. Due to the special nature of the statutes under which they were drafted they could not be assigned non-medical duties. See *Orloff v. Willoughby*, 345 U.S. 83 (1953). In this manner the Army obtained needed medical specialists and medical students obtained temporary draft deferment. But of all students the medical student was the most certain to enter the military. He was deferred temporarily, but his two years' service was not only required (for physicians certain physical requirements were often relaxed) but 50 U.S.C. (footnote continued on next page)

States Army Hospital, Fort Jackson, South Carolina, as Chief of Dermatology. Unlike other medical officers entering active duty, Dr. Levy was not sent to Fort Sam Houston, Texas, for the basic orientation course. Instead, he came to Fort Jackson "directly from civilian life." R. Vol. 8, p. 2413. It was the responsibility of an Operations Sergeant for the Plans and Training division of the hospital to show Dr. Levy upon his arrival "how to put on the uniform" and to brief him on "certain military courtesies and traditions." R. Vol. 8, pp. 2413-14. Later, the Operations Sergeant organized a group of 14 doctors who, like Dr. Levy, had not been provided Fort Sam Houston training, and conducted a "training program." The entire program "lasted for about an hour and a half to two hours each Saturday morning for a six weeks period." R. Vol. 8, p. 2414. Subjects covered during those nine to twelve hours included: the organization of the Army; the organization of the Fort Jackson Army Hospital; the system of military justice; the rights of the accused; psychological warfare; subversion and espionage directed against the Department of the Army; safeguarding defense information; map reading; chemical, biological and radiological warfare; military customs; medical field operations; communications; helicopter evacuation procedures; and safety in commands.

Dr. Levy's total training time was 16 to 26 hours,

(footnote continued from preceding page)

App. §456 (a) (1) specifically extended his draft liability to age 35. Although graduate students and others deferred through age 26 were by almost universal practice relieved of liability at that age, that was not the case with physicians, who were almost universally drafted up to age 35. The Government financed no part of Dr. Levy's medical education and, on July 9, 1965, obtained via the Doctors' Draft a commissioned officer physician who had no basic military training.

id. at 2421, and included "weapons familiarization" and being taken "out on the night infiltration course." *Id.* at 2415. "The mechanical training is about a half hour, sir," the Operations Sergeant testified, R. Vol. 8, p. 2424. This covered the "M 14 rifle and a 45 pistol. The actual firing of the 45 took about an hour, and that included the transportation to and from Andrew Jackson pistol range." *Id.* There Dr. Levy almost "hit the man next to him" and, as his instructor said, "almost me, too. I seen Captain Levy's right about two or three occasions coming back up was wrong." *Id.*

Q. Did he in fact hit someone else's target?

A. He probably did; he didn't hit his. *Id.*

His commander (and accuser at the court-martial) testified that he had been told Dr. Levy "found it difficult to comply with certain customs of the service, such as proper wear of the uniform and trimming of hair and such general things." A. 384.

The Intelligence Investigation

On July 17, 1965, Dr. Levy began participation in an off-duty, out-of-uniform Negro voter registration canvass in nearby Newberry County, South Carolina.¹¹

¹¹ William J. Treanor testified:

I was in Newberry County . . . and one Saturday afternoon I was down at the courthouse with some people, and Dr. Levy had read about our activities in the newspaper apparently, and he came up just to see what was going on, and I spoke to him then, and I invited him to come up and assist us in any way he felt he could, during his off duty hours. R. Vol. 6, p. 1057.

He came up practically every night and on weekends, and he was very helpful in that he went around from house to house

(footnote continued on next page)

On July 19, 1965, someone made the following entry on a sheet of yellow legal-sized paper in Dr. Levy's personnel file: "Determine whether [sic] a loyalty investigation should be made 19 July, 1965." A. 1146.

A civilian Army intelligence investigator (who resided in Prosperity, Newberry County, South Carolina) (the "Special Agent") commenced an investigation of Dr. Levy, the disclosed portion of that investigation (the "G-2 Dossier") containing Dr. Levy's statements that he was "... in accord with the democratic form of government as outlined in the Constitution of the United States, even though I disagree with much of the method and policy that the U.S. Government sometimes pursues," A. 761; describing his own "political beliefs as being liberal left," A. 766; and setting forth the following:

I am not a pacifist; however, I do have certain pacifistic leanings. *I am able to envision situations in which I could conceivably refuse to obey a military order given me by a commander. This would be in such a situation in which I felt that the order was ethically or morally incorrect. I would add that this cannot be a criteria of loyalty inasmuch as in such an unusual situation it might be more loyal not to obey the order. There is ample historical evidence to suggest that this has sometimes turned out to be the case. I don't think that one can honestly predict such a response in advance of the specific situation.* A. 767. [Emphasis added.]

(footnote continued from preceding page)

and explained to people who never had the opportunity to vote before, the importance of their voting in the upcoming city election and, you know, the power of the ballot and the other things that we try to get across to people who have not had any instruction before, you know, just a better democracy. *Id.* at 1057-58.

It appears that the Special Agent began looking into Dr. Levy during the summer of 1965.¹² He said he kept no notes.¹³

The Special Agent was engaged in the following colloquy:

Q. Did you make any investigation of Capt. Levy relating to his activities on affairs around South Carolina?

Col. Severin: Do you mean in the city as opposed to out here at the military?

Q. (By Mr. Morgan) Non-military, yes.

A. I did not myself.

Q. Do you know whether or not someone else did?

A. I cannot answer that. I had better delay answering that until I can see, because this pos-

■ As he put it:

A. I didn't start into this until—well, it would have been the summer of 1965. You see, I was not assigned to this until November of 1965, and then I didn't have—I could only do very limited work after being assigned here until I got a badge and credentials, and it takes some time, and prior to that there was other ment [*sic*] that had worked on the thing. I did not myself.

Q. So in the summer of 1965—

A. Somewhere. I don't know. A. 887-88.

■ The following transpired:

Q. You don't keep any notes. [He did take handwritten notes, A. 611, 953(a).]

A. No, our notes are destroyed in our office. We have only a field office. My office is in Atlanta and they are destroyed after thirty days after the report goes in after they see them here.

Q. Where did you get that information that is on here, on these notes you are referring to?

A. I got the information from my agent's report. I have burned copies of them now. A. 611-12.

sibly could be a security matter. I do not have that. I do not know that.

Q. Well, now, I am not asking you whether or not someone else did at this point. I am asking you whether or not you know whether or not someone did?

A. Well, I will have to decline to answer that.

Q. As to even whether you have knowledge of whether someone else did?

A. Right.

Mr. Morgan: At this point we request that the witness be instructed to answer the question.

Capt. Shusterman: Sir, I think this relates to certain matters that provide the basis for the classification that we have in the dossier, and apparently there are certain operational techniques and operations by certain other agencies that may be classified . . . A. 855-56.

Over fifth and sixth amendment contentions, the Special Agent was allowed to remain silent.¹⁴ A. 856-57.

The Letter

On September 10, 1965, Dr. Levy wrote an eight-page letter expressing his views on American foreign and domestic policy to a career military intelligence sergeant (8 years in the Army, R. Vol. 6, p. 1061) who was then stationed in South Vietnam. William J. Treanor, a white civilian who was in charge of the Newberry County voter registration campaign, had served in military intelligence with the sergeant, R. Vol. 8, p. 1058,

¹⁴ Indeed, although Special Agent stated the name of his immediate superior, when asked if his superior was an "Army officer" he responded, "Sir, I cannot answer that. I am not at liberty myself to answer that." A. 851.

and, since his discharge, he and the sergeant had been "corresponding fairly regularly." *Id.* at 1059. While staying at Dr. Levy's apartment, Mr. Treanor, responding to the sergeant's last letter, wrote telling him of his voter registration work and commenting on the letter he had previously received. *Id.* The sergeant's letter had told of "the way he felt about the war and the involvement there and what-not." *Id.* at 1060. The sergeant "believed that many people in the United States didn't really understand the situation as well as he thought he understood it." *Id.* at 1064. Treanor "thought it would be to a better understanding between two people I know to be very concerned about world affairs," *id.* at 1065, and testified that Dr. Levy "was invited by me to write the letter and so he sat down and did so." *Id.* at 1059. The letter itself did not disclose that Dr. Levy was an Army officer.¹⁵

This letter was the sole basis of the letter charges brought under Articles 133 and 134. For a complete discussion of the circumstances of the writing of the letter, see R. Vol. 6, pp. 1056-68.

During the year 1966, Dr. Levy engaged in private and casual conversation with Army personnel, enlisted men and officers, expressing disagreement with American foreign policy in general and Vietnam policy in particular. He critically discussed what he believed to be national and South Carolina policy regarding the rights of black citizens. Dr. Levy was accused in Additional Charge I of saying that Special Forces personnel were "liars and thieves," "killers of peasants," and "murderers of women and children." He was also accused of saying that "the United States is wrong in

¹⁵ For the full text of the letter see A. 653-60. See also R. Vol. 6, pp. 1067-68.

being involved in the Viet Nam War," that he would not serve in the war if ordered, and that "colored soldiers" were discriminated against and should not serve in the war. His words were described in Additional Charge I as being "intemperate," "defamatory," "provoking," "disloyal," "contemptuous" and "disrespectful." In Charge II it was charged that he did, "with design to promote disloyalty and disaffection among the troops, publicly utter . . . statements to divers enlisted personnel at divers times" "which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

The Bringing of the Charges

Colonel Henry Franklin Fancy assumed the hospital command in mid-1966. During his first conversation with his executive officer about Dr. Levy the following transpired.

. . . Colonel Fancy told me his [Dr. Levy's] file was flagged and, I said, for what? And, he said, "Pinko" and that is all the conversation there was. A. 1029-30.

Of the 600 men under his command only Dr. Levy's file was flagged.¹⁶

¹⁶ "Flagging" a personnel file results in non-promotion and non-transfer of the officer. This is an administrative action of which the affected officer has no knowledge. Regarding the seriousness of the action see A. 1072-84. But see A. 1012-18, regarding one other officer whose file was "flagged" due to membership in a "subversive" organization. His dossier also was read by Col. Fancy's executive officer. A. 1042. But Colonel Fancy didn't seem to know of him. A. 1079. As the matter was later clarified the other officer was merely under investigation (not "flagged") because he had been to "some meetings" but was not a member of the "civil rights group" ". . . which ha[d] demonstrated against the war in Viet Nam and, which has worked with the Negro in the South and ordered demonstrations and marches in Selma at that time." A. 1123. See also A. 1122-28.

Dr. Levy was "the first confrontation" Colonel Fancy "had ever had with a person . . . who had, in effect, been accused of being or was suspected of being a Communist." A. 798. It was a "rather shocking occurrence." *Id.*

On October 2, 1966, the Special Agent went to the office of Colonel Fancy. Colonel Fancy's G-2 Dossier statement relates:

I was not informed or aware of any difficulties encountered by Special Forces medical personnel in the Dermatology Section until the week of 2 October 1966. A. 681.

At that first meeting the Special Agent "... said that Capt. Levy had attended certain meetings in New York City and that the apparent organization behind these meetings were [sic] suspect in some way." A. 796-97. "[H]e said they possibly had some association with Communism. This was the suspicion, of course . . .," A. 797, and he told Colonel Fancy "that Capt. Levy had been having some dealings with the negro [sic] personnel, which . . . were of an unpatriotic nature. . . ." 17 A. 801-802.

The Special Agent did not directly raise the question of Dr. Levy's civil rights and voter registration activities at that time:

Other than the statement that the Special Agent

"The Special Agent denied providing Colonel Fancy any information. "I do not give any information I receive," he said. "I do not divulge the sources in talking to him at that time or any time."

He did acknowledge asking "... questions and anyone intelligent, such as Colonel Fancy, can deduct from the questions I ask what I am getting at insofar as the questions I am asking. Insofar as telling the Colonel that he is this, he is that, or who said he said this, I do not do that." A. 861.

made that there was some indication that Capt. Levy was discussing with negros [sic] their duty performance in other areas . . . and that Capt. Levy was possibly talking to them on certain rather unpatriotic terms. This is the impression that I recall having when he told me this. A. 800-01.

On October 11, 1966, following these visits from the Special Agent, Colonel Fancy ordered Dr. Levy to provide Special Forces Aidmen ten hours of training in dermatology. Although he trained all other military *medical* and *para-medical* personnel in dermatology, Dr. Levy declined the order on ethical grounds.

Thereafter, Colonel Fancy initiated Article 15, UCMJ, 10 U.S.C. §815 (minor non-judicial punishment^{17*}), proceedings against him. In the "middle" of December, 1966 "[t]he G-2 dossier became available" to Colonel Fancy. He "revised" his "estimate of the situation."

Q. In what way?

A. At that time I was contemplating action under Article 15 because of dereliction in duty. As a result of reviewing the dossier and talking with the Judge Advocate, I felt the charges of a more serious nature were present.

Q. You ordinarily would have dealt with this as a dereliction of duty problem, wouldn't you?

A. Up to that point.

Q. What was it about the dossier that made it

^{17*} The maximum being a withholding of privileges, suspension of pay and duty and restriction to limits but in none of these events for more than one-half month.

seem more serious than an Article 15 offense to you?

- A. There were certain documents of a confidential nature contained therein which indicated problems of a possibly serious nature with other personnel. A. 808-09. See also A. 1052-53.

Colonel Fancy had previously talked about the matter with Colonel Rawlins, his personnel officer, who had told him

... there were certain records primarily in the hands of the CID or CIC. ...

...
CIC, and I told him I didn't know any of the particulars, but I knew there was certain undertow around the area that he should be looking towards that end of it, too. A. 813.

and Colonel Rawlins' "loyalty" and "security" evaluation of Dr. Levy was also based solely on the Counter-Intelligence Corps' files. *Id.* The complete G-2 Dossier was "unavailable" to Chief Defense Counsel.¹⁸ A. 809-10, 812, 814-19, 829-45.

¹⁸ Demands were made for the entire 180-page Dossier (100 pages of which were never provided) on the grounds of the fifth and sixth amendments, the rights to due process, confrontation, knowledge of the nature and cause of the accusation, and effective counsel. Military counsel assisting in the case was placed "... in a position also of a conflict somewhat akin to that of Capt. Levy, in that Army regulations, of course, require him to maintain the secrecy of matters in the dossier, while at the same time his duty as an attorney to his client requires a full disclosure to his client of all matters and facts that come into his possession and knowledge." A. 841. See Exh. C. 50. Fourth amendment grounds were also later invoked, A. 833, as were other constitutional demands arising from the first and ninth amendments. At every opportunity the Government contended that the defense was not entitled to discover its intelligence "techniques." See, e.g., testimony of the Special Agent, A. 856-77.

Colonel Fancy had others read the Dossier. As his executive officer put it, "[h]e just up and suggested that I go read it." A. 1042.

Q. Well, he didn't suggest that just as a part of your regular reading program?

A. I think so.

Q. Was there no given reason that you were to read this?

A. No, sir. *Id.*

To Colonel Fancy, Dr. Levy:

1. Was a "pinko" or "communist." A. 796-99.

2. Then, on February 17, 1967, he was not a Communist—"I was worried about it for a while, but the C.I.C. conducted a thorough investigation and it is my recollection that they determined that he was not a communist." A. 1185.¹⁹

3. Then at trial the following transpired:

Q. It wasn't until February that you discovered that he wasn't a Communist, was it, February of this year?

A. I have to my knowledge not yet discovered that fact.

Q. I thought you said he got a clearance at your last—I thought when you were testifying?

A. Yes, sir, I know what you mean and I thought I had a clearance, but, I have subsequently been told that I have not had a clearance.

¹⁹ On February 17, 1967, he was as "... certain that insofar as humanly possible he had been cleared as being a member of the communist party." A. 423(h).

Q. Well, that day you knew that he wasn't?

A. Yes, sir.

Q. And today you're not sure again?

A. Today I believe he has not yet been, I know he has not yet been cleared by this National Agency check. A. 398.²⁰

Colonel Fancy agreed that he "... obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents." A. 423(h).

Following conviction and June 3, 1967, sentencing,²¹ Dr. Levy exhausted his military procedures²² and then

²⁰ Had Dr. Levy been proceeded against under 10 U.S.C. §3791 which provides for convening a board "... to determine whether [an officer] shall be required, because of moral dereliction, professional dereliction, or *because his retention is not clearly consistent with the interests of national security*, to show cause for his retention on the active list," (emphasis added), he would have been "... allowed full access to, and furnished copies of records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security." 10 U.S.C. §3795(4).

Where records are withheld the officer "... shall, to the extent that the national security permits, be furnished a summary of the records so withheld." 10 U.S.C. §3795. During these proceedings no national security interest was claimed.

²¹ On August 2, 1969, Mr. Justice Douglas ordered Dr. Levy released on bail pending habeas corpus. *Levy v. Parker*, 396 U.S. 1204 (1969). On October 13, 1969, this Court unanimously agreed. *Levy v. Parker*, 396 U.S. 804 (1969).

²² *United States v. Levy*, C.M. 416,463, 39 C.M.R. 672 (ABR 1968), *petition for review denied*, No. 21,641, 18 U.S.C.M.A. 627 (1969). Other proceedings are reported as follows: *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967) (sought to enjoin conduct of court-martial); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *Levy v. Resor*, Civ. No. 67-442 (D. S.C. July 5, 1967), *aff'd per curiam*, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049 (footnote continued on next page)

filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The petition was denied on June 30, 1971.²³

He appealed to the United States Court of Appeals for the Third Circuit. On April 18, 1973, the court of appeals reversed the district court, holding Articles 133 and 134 unconstitutional and reversing the Article 90 conviction for prejudicial joinder. Its order said:

the cause [is] remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court. J.S.A. 96a-97a.

Carmen C. Nasuti, an Assistant United States Attorney for the *Eastern* District of that State, on May 16, 1973, filed a notice of appeal from the court of appeals' decision. The notice was signed by Mr. Nasuti only. It also bore the typed name of the United States Attorney for the Eastern District. No counsel of record, either in the court below or from the Solicitor General's office, was listed on the notice. At no time has either of the persons listed on the notice entered an appearance.

Mr. Nasuti, who signed the notice and the certificate of service, was not a member of the bar of this Court. Supreme Court Rule 33.3(c) requires proof of service by an affidavit, not merely a certificate, when service is made by a non-member of the bar of this Court.

(footnote continued from preceding page)

(1968) (sought bail pending intra-military appellate review); *Levy v. Dillon*, 286 F.Supp. 593 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969) (regarding relief while incarcerated at United States Disciplinary Barracks pending intra-military appellate review).

²³ See J.S.A. 98a-103a.

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the mandate of the court of appeals had duly issued on May 10, 1973. On July 13, 1973, the Government filed a "Motion To Stay That Portion Of The [Court Of Appeals'] Order And Mandate Of April 18, 1973" which required that Dr. Levy be retried (if at all) within ninety days of said order. Appellee received the motion on July 16, 1973. It was transmitted by letter, signed by another Assistant United States Attorney for the Eastern District of Pennsylvania, James H. Manning, Jr. The motion was typed in the name of a counsel of record, William A. Pope, but was not signed by anyone.

Also on July 13, 1973, the Solicitor General applied to this Court for and this Court granted an extension of time to July 30, 1973, to docket the appeal.

On July 17, 1973, appellee filed in the court of appeals an Opposition to the partial stay of mandate, alleging *inter alia* that Rule 41 applies only to stays of mandate pending application for certiorari, not appeal, that the mandate had already issued and its recall had not been requested, and that the appellants had failed to show legal cause for stay or legal justification for application so long after the mandate had issued and so shortly before it was to be complied with.

On July 26, 1973, the court of appeals treated the Government's motion as a request for a recall, and ordered the mandate recalled with the stated condition that an appeal be docketed by July 30, 1973.

The appeal was docketed on July 30, 1973. This Court on October 23, 1973, postponed further consideration of the question of jurisdiction until the hearing on

the merits. The Government filed its brief on January 3, 1974. This case is set for argument in tandem with *Secretary of the Navy v. Avrech*, No. 72-1713 (Oct. Term, 1973).

SUMMARY OF ARGUMENT

This Court does not have jurisdiction because of the Government's failure properly to file notice of appeal. The Government failed to file proper notice of appeal and the time for appeal expired. The time for filing is set by statute, 28 U.S.C. §2101(a), and is not subject to waiver as would have been a failure to comply with the Court's rules. The Government did not properly serve the notice of appeal in violation of Rule 33.3(c) of this Court.

If an appeal may be taken under 28 U.S.C. §1252 from the court of appeals, as the Government argues, then this appeal cannot be treated as a petition for writ of certiorari under 28 U.S.C. §2103 since there was a right to appeal and, consequently, the appeal was not "improvidently" taken. Indeed, it was not taken at all since the Government failed to file a proper notice of appeal. Section 2103 was never intended to excuse formal jurisdictional errors in prosecuting an appeal. It was intended to apply when certiorari rather than appeal was the proper route.

Dr. Levy was prosecuted for speaking. There was no evidence to prove any element of four of the five crimes charged other than his words. No conduct by Dr. Levy was alleged or proved. No listener conduct or act was alleged or proved. Cf., *Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Truth was rejected as a defense to the pure speech charges in violation of the first amendment and deci-

sions of this Court. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Yates v. United States*, 354 U.S. 298 (1957). The members of the court were left free to set their own standards of whether a "harm" resulted from the words, no legislative, judicial or administrative standards existing. This "no standard" practice has been uniformly condemned. *Gooding v. Wilson*, 405 U.S. 518 (1972). The clear and present danger test, *Schenck v. United States*, 249 U.S. 47 (1919)—a test applied by military courts, *United States v. Priest*, 21 U.S.C.M.A. 564 (1972)—was rejected in Dr. Levy's prosecution. Instead, a culpable negligence standard was employed. In first amendment prosecutions the burden on the regulator to demonstrate the constitutionality of the regulation of speech is especially high, *DeGregory v. New Hampshire*, 383 U.S. 825 (1966); *Abrams v. United States*, 250 U.S. 616 (1919), and here there was not only a complete lack of evidence to meet that burden, but there was no proof of any danger upon which to base a regulation of pure speech.

Regarding the order charge the military administratively created a presumption that all its orders are lawful. Additionally it recognized no defense that the ethics of a physician may conflict with a military order. The shift in the burden of demonstrating the illegality of the order to train Special Forces combat troops in advanced medical techniques violated due process. *Morisette v. United States*, 342 U.S. 246 (1952). Special Forces Aidmen are combat troops—they are not Geneva Convention-protected or Army-recognized medics. On A-Teams they are not accompanied by a physician and are subject to commands of non-medical superiors even as to whether or not to abandon their patients. They

carry weapons, kill, and use sodium pentothal on prisoners. The Aidman program used medicine "as a means of approaching the enemy and imposing our will on him," and as a "political" and "military" weapon. Dr. Levy was bound to impart his knowledge to only those persons subject to the Oath of Hippocrates and to keep the confidences of his patients. He trained physicians and medics, and he trained all combat troops in first aid. But he refused advanced medical training to combat troops and refused to allow them to observe his treatment of patients. This was consistent with his oath and an Army Medical Bulletin and Regulation which decreed that venereal disease information be divulged to medical or health personnel only. It was also consistent with *United States v. Seeger*, 380 U.S. 163 (1965) and *Clay v. United States*, 403 U.S. 698 (1971). When the training was provided by another physician the patient's right of privacy and confidentiality was violated. The law officer refused to instruct the court-martial that if it found Special Forces was not a medical or health agency and that its Aidmen through the training program would have learned of the names of venereal disease patients and contacts, then the order was illegal. The prosecution offered no justification or necessity for rejection of Dr. Levy's ethical beliefs or the invasion of his patients' rights, arguing only that the *Manual* does not recognize these defenses. The ethical beliefs of Dr. Levy and his patients' right of privacy demand protection rather than an unexplained refusal to recognize them, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Thomas v. Collins*, 323 U.S. 516 (1945); *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the prosecution completely failed to justify its refusal. *Sherbert v. Verner*, 374 U.S. 398

(1963); cf. *Whelchel v. McDonald*, 340 U.S. 122 (1950).

The law officer disregarded the military's "some evidence" rule and Field Manual (FM) 27-10 *Law of Land Warfare* (1956) and refused to permit the war crimes defense to the order charge to go to the court. Military law requires only "some evidence" as a condition for submission of a defense to the court. *United States v. Evans*, 17 U.S.C.M.A. 283, 38 C.M.R. 361 (1967). The abundance of proof on war crimes clearly met this test. Compare *Whelchel v. McDonald*, 340 U.S. 122 (1950). The law officer ruled only that he knew "of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States." Cf. *In Re Yamashita*, 327 U.S. 1 (1946).

Civil court deference to military judgment regarding violations of military custom is rooted in a British Commonwealth case which was based on the lack of military experience of common law judges and the then unwritten nature of military law. See *Smith v. Whitney*, 116 U.S. 167 (1886). But the extent to which law has been reduced to writing and the wide-spread distribution of printed matter coupled with the exclusive appointment of civilian officials as final arbiters of military matters (e.g., members of the United States Court of Military Appeals *must* be appointed from civilian life, 10 U.S.C. §867(a) (1)) eradicates the basis for continued deference. Since our constitutional system rejects military encroachment and military courts are not well suited to the applicatory nuances of constitutional law, *Reid v. Covert*, 354 U.S. 1 (1957); *O'Callahan v. Parker*, 395 U.S. 258 (1969), civilian deference to the military should cease, the justification therefor no longer existing.

Articles 133 and 134 are vague and overbroad. They were always intended to be vague and serve as a "catch-all." The "higher code termed honor" of military officers is a myth, Winthrop, *MILITARY LAW AND PRECEDENTS* 710-711 (2nd Ed. 1920), and the words specifying the charges against Dr. Levy ("disloyal," "disgrace" (to himself and the military), "offending justice, law, morality or decorum,") are not only unconstitutionally vague and impermissible but, if clear, were not supported by evidence. If any one such word or phrase is constitutionally deficient, the conviction must be set aside. *Terminiello v. Chicago*, 337 U.S. 1 (1949). The "catch-all" net of the General Articles is too broad, *United States v. Reese*, 92 U.S. 214 (1876), and encourages arbitrary and discriminatory enforcement by delegating to administrative officials the absolute authority to define and thus create offenses. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Executive branch definition of offenses is unconstitutional, *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960). Cf. *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). "Disloyalty" is a hard word to define in a kinetic world and Dr. Levy was convicted without an adequate definition of the word being provided even to the court at the conclusion of his trial, cf. *Bowie v. City of Columbia*, 378 U.S. 347 (1964), let alone to him in advance of his remarks. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Stromberg v. California*, 283 U.S. 359 (1931).

The court of appeals was clearly correct in holding the Articles constitutionally deficient in three respects—they deny due process for lack of notice and warning,

encourage an arbitrary and discriminatory enforcement, and infringe on first amendment rights.

The justifications for these vague military statutes—maintenance of high standards of conduct, ease of conviction, punishment of unforeseen crimes—are insufficient to overcome their constitutional defects. The maintenance of high standards contention was rejected in *NAACP v. Button*, 371 U.S. 415 (1963). The court of appeals correctly found the ease of conviction justification “totally bereft of explicit support.” The punishment of unforeseen crimes is prohibited by the *ex post facto* clause. The military has no General Articles need that could not be met by explicit due process-standard statutes.

The actual use to which the General Articles are put underscores their lack of necessity. They are employed to increase punishment, to create offenses where there is a lack of substantive proof of crime, and to duplicate other charges. The charges against Dr. Levy well illustrate the abuses to which the General Articles are put. Two charges were based on the writing of one letter. Two charges were based on speaking the same words. The letter charges were conceded to be multiplicitous for punishment purposes—but when they were dismissed the maximum punishment possible was reduced. One charge alleged a violation of a Title 18 offense. Other charges were evidently created by omitting an element of Article 88. These abuses deprived Dr. Levy of due process.

The General Articles were appropriately declared facially void because their overbreadth is more than substantial—it is total. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Dr. Levy's case presents no merely

"marginal" questions of coverage. The General Articles do not clearly cover "a whole range of easily identifiable and constitutionally proscribable" conduct, *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548, 581 (1973). This case presents speech, not conduct, problems and Dr. Levy asserts his own rights, not the rights of others. Since the General Articles are enforced by administrative officials who are subject to limited Article III court review and the General Articles are not subject to limiting construction in a single prosecution, the most efficient means of protecting the rights of individuals is to consider the Articles on their face rather than in case by case review. *Broadrick v. Oklahoma, supra*. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

Dr. Levy's conviction resulted from the selective and unequal enforcement of the law and was error even if the statutes involved are deemed constitutional. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). He was presumed a communist and charged because of his political beliefs and civil rights work. Additionally, Dr. Levy's controversial conversations were constitutionally protected. They were not held with merely the "young and immature," but were primarily held with those who had the "highest" intelligence. The Army erred in applying criminal sanctions to "correct" Dr. Levy's speech. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

The Army did not provide Dr. Levy the military training it provided other officer-physicians. Although the Government contends that Dr. Levy had knowledge of military law and customs—a contention based solely on an Army regulation which states that officers should

be exposed to the *Manual*—the undisputed facts are to the contrary.

Dr. Levy's rights were violated when the prosecution refused to disclose the major portion of the G-2 Dossier—the dossier upon which elevation of the charges to court-martial status was based—to his civilian and chief defense counsel. The dossier was of the lowest security classification, no national security justification was even claimed, and in its entirety it was disclosed to the prosecution and to the appointed assistant military defense counsel who could not reveal its contents to civilian chief counsel or to his client. The parts disclosed were “window dressing.” *Molignaro v. Smith*, 408 F.2d 795 (5th Cir. 1969).

The dossier may have included pre-service political information upon which the accuser and the prosecution could not constitutionally rely, *Harmon v. Brucker*, 355 U.S. 579 (1958); or it may have contained the accused's racial or political views which contributed to the decision to upgrade the prosecution to court-martial status, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967); or illegally obtained matter or its fruit. *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963). Any evidence favorable to the accused's defense or constitutional claims should have been disclosed. Cf. *Brady v. Maryland*, 373 U.S. 83 (1963).

The prosecution submitted questionnaires to some 450 of the 17,500 patients who were treated in Dr. Levy's clinic. Thirteen of these were called as witnesses

and the defense was permitted access to only the responses of these thirteen. Dr. Levy, without ability to even identify the balance of the 450 persons, *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967), sought their questionnaires to prove he did not "publicly" utter statements with design to "divers personnel," that the prosecution could find but thirteen witnesses who had heard any one or more of his remarks. The prosecutor and not a judicial authority was impermissibly allowed to decide what the defense could find useful. *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950). The defense did not rely on the Jencks Act, 18 U.S.C. §3500, but on the duty of the prosecution not to withhold evidence favorable to the accused. *Brady v. Maryland*, *supra*. The district court also denied Dr. Levy's request for discovery of illegally obtained evidence, relying on the good faith representation of one of the Government's counsel that there was none. But a single good faith representation of but one Government lawyer was demonstrably insufficient in light of the number of attorneys involved in the prosecution.

The joinder of separate and inconsistent offenses prejudiced Dr. Levy regardless of whether the charges were constitutional. The statements charged to Dr. Levy must have prejudiced his career 10-man military court. The most prejudicial language was charged under multiplicitous offenses. The court of appeals correctly applied the test this Court authorized to determine prejudice. The letter charges were dismissed only after the court had determined guilt. The court's sentence was general and was based on the pure speech as well as the order charge. *Estes v. Texas*, 381 U.S. 532 (1965); *Kotteakos v. United States*, 328 U.S. 750 (1946).

Joinder is inconsistent with federal practice, Rule 8(a), Federal Rules of Criminal Procedure, which the President in promulgating procedure is bound to follow, 10 U.S.C. §836, where, as here, there was no indication that severance would be impracticable.

Dr. Levy was denied his sixth amendment right to fair trial by the exclusion of various identifiable groups from the court-martial panel, resulting in a court of less than impartial finders of facts. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Whitus v. Georgia*, 385 U.S. 545 (1967); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). Even military trials must comply with the constitutional command of impartiality. *Burns v. Wilson*, 346 U.S. 137 (1953). Command influence permeated this trial. *Reid v. Covert*, 354 U.S. 1 (1957).

The unfairness of the "jury" selection system was enhanced by use of the two-thirds verdict, limitation on peremptory challenges and permitting court members to vote on the challenges for cause.

The Article 32 proceeding was conducted by an officer under command influence, and was closed to the public. Cf. *In Re Oliver*, 333 U.S. 257 (1948). This was a "critical stage" of the prosecution. *White v. Maryland*, 372 U.S. 59 (1963).

The prosecutor had a preferred role in the eyes of the court-martial members (he served as clerk, bailiff, prosecutor, *amicus*, custodian, and special investigator, administered oaths, and even subpoenaed defense witnesses). The Staff Judge Advocate's presence permeates the Record. In this case he illegally served as an investigating officer and thereafter as Staff Judge Advocate.

Dr. Levy was entitled to be tried far from Fort Jackson, if at all. Where the trial was conducted, a defense witness feared reprisals for testifying; another was threatened by a man who mistook him for Dr. Levy; the court was not sequestered; the Public Information Officer distributed a press brochure seeking to discredit a defense witness; and a one-eyed court member received a telephone threat to deprive him of his good eye. The atmosphere compelled a change of venue to provide fairness. *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Each of these grounds is proper for affirmance of the decision below. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CAUSE BECAUSE OF THE GOVERNMENT'S FAILURE TO PERFECT THE APPEAL.

On motion to dismiss or affirm, appellee urged a lack of jurisdiction in this Court because the attorneys who filed and served the notice of appeal were not attorneys of record, and further that the attorney effecting service failed to comply with Rule 33.3 (c) of this Court which requires persons not admitted to the bar of this Court to prove service by affidavit, not by certificate.

Even though appellants sought and obtained a stay of mandate from the court of appeals under Rule 41 which allows stays pending petitions for certiorari, they now insist that 28 U.S.C. §1252 permits an appeal from courts of appeals.¹ If the contention is well taken ap-

¹ Section 1252 reads in relevant part as follows:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of (footnote continued on next page)

pellants would be required to comply with the statutes and rules of this Court for perfecting appeals. *Monger v. Shirley*, 131 U.S. Appendix cx, 20 L.Ed. 635 (1872) (appeal cannot be inferred from the state of the record but must be properly brought before the Court); *Castro*

(footnote continued from preceding page)

the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"Court of the United States" includes courts of appeals. 28 U.S.C. §451. Section 1252 is based on Act of August 24, 1937, ch. 754, §2, 50 Stat. 752 and "court of the United States" was defined by §5 of that Act to include "any circuit court of appeals," now courts of appeals.

Sec. 2. In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

Sec. 5. As used in this Act, the term "court of the United States" means . . . any district court of the United States, any circuit court of appeals, and the Supreme Court of the United States. . . .

(footnote continued on next page)

v. United States, 70 U.S. (3 Wall.) 46 (1866) (appeal dismissed for failure to prosecute within statutory time limit).

The requirement of filing a timely notice of appeal is jurisdictional, since it is fixed by statute, and is not subject to waiver by this Court. See, *Territo v. United States*, 358 U.S. 279 (1959); *Hartford Accident & Indemnity Co. v. Bunn*, 285 U.S. 169, 177 (1932); Stern and Gressman, SUPREME COURT PRACTICE §7.3, page 333 (4th ed. 1969); Boskey and Gressman, *The 1970 Changes in the Supreme Court's Rules*, 90 S.Ct. 2337, 2346 n. 7.

(footnote continued from preceding page)

The definition in §5 was broad-based and evidently a standard definition inserted by a draftsman (it superfluously permitted, for example, appeals from the Supreme Court to the Supreme Court). The statute had two purposes—to give the Attorney General a right to intervene in litigation where the constitutionality of an Act of Congress was at issue, 81 CONG. REC. 3254 (1937), and to provide for expeditious decision by this Court. *Id.*, p. 3255, 8507. There does not appear from the records any indication that the appeal should be limited to those from district courts, although this was the concern. At one point the Chairman of the Committee on the Judiciary of the House of Representatives stated:

... Of course, this would not be an attempt to give the right of appeal where the right to appeal does not now exist under the law; at least, that is our view. It gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals. *Id.*, p. 3272.

Later debate, however, indicated that the language of §5 did not so limit the right of appeal. See, 81 CONG. REC. 3254-73, 8507-15 (1937); H.R. Rep. No. 212, 75th Cong., 1st Sess. (1937); S. Rep. No. 963, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1490, 75th Cong., 1st Sess. [Conference report] (1937).

But as appellee pointed out in his Motion to Dismiss or Affirm, page 7, note 11, whether or not §1252 actually permits appeal in cases such as this is apparently a matter of first impression. Stern and Gressman, SUPREME COURT PRACTICE (4th ed.) at 31.

If the Government is correct, if 28 U.S.C. §1252 authorizes appeals from courts of appeals, then the Government's appeal may not properly be treated as a petition for writ of certiorari. ~~_____~~
~~_____~~

~~_____~~ The authority to treat an "improvidently taken" appeal as a certiorari petition was granted by Congress in 28 U.S.C. §2103 and is limited to those cases where certiorari was the proper mode of review. Section 2103 was never intended to authorize the treatment of defective appeals as petitions for certiorari in order to avoid the statutory time limit set in Section 2101 (a). *Cf. United States v. Cotton*, 397 U.S. 45 (1970).

Moreover, this Court dismisses appeals for failure to comply with the time limits its rules set for filing notices of appeal, *e.g.*, *Taggart v. New York*, 392 U.S. 667 (1968), and for docketing appeals, *e.g.*, *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), *rehearing denied*, 385 U.S. 995 (1966). Although no statute or Court rule directly covered the failure to prosecute held fatal in *Castro v. United States*, *supra*, the Court ruled that general statutes regarding invocation of its appellate jurisdiction nonetheless required dismissal.

Even though the Court in an appropriate case may exercise its discretion to excuse failures to comply with its rules, this is not such a case. *See, Pittsburgh Towing*, holding that use of judicial discretion to permit a late appeal was not warranted where there was no explanation of appellants' delay until after appellees had filed their motion to dismiss, and the explanation then given was insufficient. Like the appellants in *Pittsburgh Tow-*

ing, the Government here offered no explanation of its failure to comply with the rules until such failure was pointed out by counsel for the appellee. Moreover, the Government's explanation is even less forgivable than the "misunderstanding between counsel" which was found unsatisfactory in *Pittsburgh Towing*. The Government does not claim misunderstanding. It does not even claim negligence. Instead it claims that it failed to follow the rules for its own "geographical convenience."² Whatever the threshold for excusable non-compliance, a Government "geographical convenience" justification does not reach it. As this Court observed in *Pittsburgh Towing*,

if there are to be rules, there must be some limit to our willingness to overlook their violation. 385 U.S. at 32.

The Government further claims that "[t]his case was handled in the lower courts by the United States Attorney's Office for the Middle District of Pennsylvania." Brief for Appellants, p. 25. The Government's representation is incorrect. In fact, this case has been handled throughout by lawyers from the Department of Justice and Department of Defense in Washington, D. C. Washington attorneys—not Pennsylvania attorneys—wrote the briefs and made every oral argument presented to the district court and the court of appeals. As with the newly-elected State's attorney substituted as a party for his predecessor in *Spomer v. Littleton*, — U.S. —, 94 S.Ct. 685 (1974), the legal connection of the attorneys who filed and served the notice of appeal

² Brief for Appellants, at 25. This "reason," of course, does not explain why the attorneys whose assistance was requested did not comply with the simple legal steps necessary to file and serve an effective notice of appeal.

in the instant case is limited to their signatures. Their mere Government job status provided them no legal introduction here and they were and remain legal strangers, their connection with this case being far less than that of Spomer with the *Littleton* case, since Spomer actually took over the functions of the party he replaced. Yet this Court refused to give legal effect to Spomer's actions, instead remanding for determination by the court of appeals whether he was a proper party at all. *Id.* at 690. Similarly, no legal effect should be given the notice actions of Government counsel here, counsel who had no real connection with this case.

The Government has not responded to the argument that since the notice of appeal was filed by counsel not of record³, it has no legal force or effect. The Government apparently believes this contention to be "frivolous." Brief for Appellants, p. 24. True, modern versions of court rules in many jurisdictions permit filing of notice of appeal by any counsel representing the appellant, *See, e.g., In re Hultin's Estate*, 29 Cal. 2d 825, 178 P. 2d 756 (1947). But where statutes or rules which require filing of notice of appeal by counsel of record have not been relaxed, as is the case here, filing by an attorney not of record is insufficient and the appeal must be dismissed. *Anglo-California Trust Co. v. Oakland Rys.*, 191 Cal. 387, 216 P. 578 (1923). Even if the time for filing a valid notice of appeal has expired, the appellee's motion to dismiss must be granted. *Jackson v. Jackson*, 71 Cal. App. 2d 837, 163 P. 2d 780 (1945).

³ See, Motion to Dismiss or Affirm, pp. 5-8, and rules set out in the Appendix to the motion. The Government does not contend that notice was filed by any counsel of record or that service was done in compliance with the rules.

See generally, 4A C.J.S. Appeal and Error §591 at 322, *id.* §593 (10) at 347-348.

The Government suggests that since its failure to follow proper procedure did not deprive Dr. Levy of actual notice of the appeal, that failure can be ignored. But that is not the law. The appellees in most cases where defective appeals have been dismissed apparently had actual notice of such appeals. *See, e.g., Monger v. Shirley, supra; Pittsburgh Towing, supra; Hartford Accident & Indemnity Co. v. Bunn, supra; Castro v. United States, supra.*

No counsel in this case has filed a legally sufficient notice of appeal. The time for filing expired thirty days after the court of appeals' judgment on April 18, 1973. 28 U.S.C. §2101 (a). Since the Government's effort to file failed to comply with applicable rules and statutes, and no good cause—indeed, no reason at all beyond appellants' "convenience"—has been shown for non-compliance, this appeal should be dismissed for lack of jurisdiction.

II. THE PROSECUTION FOR PURE SPEECH VIOLATED THE FIRST AMENDMENT. THERE WAS NO EVIDENCE TO PROVE THE OFFENSES.

It is no longer contested by the Government that the Bill of Rights applies to the military and that the first amendment "exact[s] obedience even during periods of war." *Dennis v. United States*, 341 U.S. 494, 520 (1951) (concurring opinion of Mr. Justice Frankfurter). First amendment incursions require a showing of an "over-riding and compelling state interest," *DeGregory v. New Hampshire*, 383 U.S. 825, 829 (1966); a military necessity which must be "most extraordinary," Warren,

The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181, 197 (1962); and "that an immediate check is required to save the country," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Mr. Justice Holmes, dissenting).¹

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Mr. Justice Brandeis, concurring).

Our form of government is built on the premise of free expression. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Marsh v. Alabama*, 326 U.S. 501 (1946). Neither the framers of the Constitution nor this Court have excepted military personnel from this premise. An exhaustive study of the debates by the framers on the application of the Bill of Rights to the military concludes that there is "little reason to suppose that the framers desired Congress to be wholly free of first amendment restraints in legislating for the armed forces." Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 315 (1957). The test where speech and nonspeech are mixed in regulated activity was stated in *United*

¹ So lacking in immediacy—so "unpresent" and "unclear"—was the danger of Dr. Levy's speech that he remained in the dermatology clinic practicing medicine until the day the court-martial began almost six months after the charges were brought.

States v. O'Brien, 391 U.S. 367, 376-77 (1968):

This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]

Where, as here, *only speech* is involved and *no conduct* was alleged or proved, the regulation of that speech must be justified by an "overriding" or "compelling" or "substantial" or "subordinating" or "cogent" or "strong" governmental interest. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 465 (1958) ("whatever interest the State may have . . . has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order"); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (no interest sufficient ". . . to justify the substantial abridgement of associational freedom which such disclosures will effect"); and *Gibson v. Florida*, 372 U.S. 539, 557 (1963) (record failed to demonstrate "the compelling and subordinating governmental interest essential to support" the interference with liberties).

The need for a "showing of 'overriding and compelling state interest,'" *DeGregory v. New Hampshire*, 383 U.S. 825, 829 (1966), was not met in Dr. Levy's prosecution. The requisite test of danger was not shown by mere recitation of his allegedly "disloyal" words. Nor did the mere incantation of the words "military necessity" without a showing of that "necessity" suffice. Instead, the Government's interest should have been established either by evidence or by a considered legislative judgment, neither of which was present here.²⁸

There is no showing in this Record of either a "clear" or "present" or, for that matter, any other "danger," *Schenck v. United States*, 249 U.S. 47, 52 (1919), and under no conceivable set of circumstances was there any "incitement," *Musser v. Utah*, 333 U.S. 95, 102 (1948).²⁹

Wood v. Georgia, 370 U.S. 375 (1962), injected vitality into the *Schenck* and *Abrams* test. In *Wood* the

²⁸ Compare the Government's administrative addition of the phrase "disloyal statements" with the considered legislative judgment in *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973).

²⁹ Only after an exhaustive examination of the facts and circumstances has this Court ruled against claimed first amendment rights. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Dennis v. United States*, 341 U.S. 494 (1951). The defense in a speech case is entitled to prove the absence of the clear and present danger. *Cf.*, *Whitney v. California*, 274 U.S. 357, 379 (1927) (Mr. Justice Brandeis concurring) (legislative finding of danger not contested); *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 11 (where factual determination is made). Here Congress "defined" the evil—prejudice to order and discipline and conduct unbecoming an officer and a gentleman. "Disloyalty" as an evil to be regulated since it might create the danger has been found by no one (save the apparently anonymous conclusions of an administrative intelligence official) and there was no evidence to find that Dr. Levy's speech fell within the ambit of any such term however defined.

Court searched the record for evidence of a clear and present danger but found only that type of " 'danger' . . . envisioned by the Founders in presenting the First Amendment for ratification." 370 U.S. at 388. Wood proved once again that the clear and present danger test is " 'a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' " *Id.* at 384.

In the total absence of evidence the Government interest served by Dr. Levy's prosecution may be speculated upon. Perhaps the Army really did believe that Dr. Levy's remarks in the Dermatology Clinic in Columbia, South Carolina, would impair its battlefield efficiency or morale or otherwise adversely affect the course of the war in Vietnam or demoralize South Carolina's civilian population. Perhaps there were other speculative flights upon which the prosecution was based. But there was absolutely no evidence to show that this occurred nor was there any evidence as to how this might have occurred. And, speculation as to the Government's interest will not suffice to excuse the Government's failure to prove its interest in prosecuting pure speech. Indeed, the most likely speculation is that the Army's interest in Dr. Levy's prosecution was to silence dissent, an impermissible interest at best.

III. THE CONVICTION VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT SINCE THERE WAS NO EVIDENCE TO PROVE THE NECESSARY ELEMENTS OF THE PURE SPEECH CHARGES.

In *Garner v. Louisiana*, 368 U.S. 157, 163 (1961), this Court held that a state court conviction must be set

aside under the due process clause if it is "totally devoid of evidentiary support. . . ." *Accord, Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Fields v. City of Fairfield*, 375 U.S. 248 (1963) (per curiam); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *Garner, Thompson, Fields and Gregory* say simply that if there is no evidence to prove one or more of the essential elements of a charge, the conviction cannot stand. "In addition," as the Court stated in *Garner*, the concern is not

whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction. 368 U.S. at 164. [Footnote omitted.]

A. Charge II (Under Article 134)

Here the law officer charged the court that requirements for guilt were:

- 1) that the statements alleged were made to "divers enlisted personnel at divers times";
- 2) that the statements were publicly made;³⁰
- 3) that these statements were made with the design to promote disloyalty and disaffection among the troops;
- 4) that these statements were disloyal to the United States;
- 5) that these statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops;
- 6) that under the circumstances the conduct of the

³⁰ The "publicly made" element of the crime was deleted by the law officer on the same page of the Record. A. 628.

accused was to the prejudice of good order and discipline in the armed forces. A. 627-28.

The court was instructed that if it found the accused did not utter any one or more of the specified sets of words it could base a conviction on the other phrases it did find he uttered, A. 630, excepting any unmade statements from its findings. The court findings excepted no statements.

Army Regulation 600-20, ¶42 protects the right of military personnel "to express their opinions privately and informally on all political subjects and candidates, and to become candidates for public office." The law officer in his charge defined "publicly utter" as "to make, to state, to publish, to put forth, or to put in circulation openly, generally, or notoriously as distinguished from doing so privately or in secret."³¹ A. 630. The Government contended:

The facts support the conclusion that the accused uttered the statements in question *with the specific intent that the message take hold*. . . . Government Brief Contra Motion to Dismiss Charge II, R. Vol. 10, Appellate Exhibit 3, last page thereof.

The law officer defined "disloyalty" and "disaffection" as follows:

"disloyalty" imports not being true to or being unfaithful to an authority to whom respect, obedience, or allegiance is due and tending toward insubordination, refusal of orders, or mutiny. A. 630;

³¹ If Dr. Levy had conversed "secretly," he no doubt would have faced other perhaps more serious charges. If he had made his statements more formally, in the public arena off-post and out of uniform, he no doubt would have been prosecuted under *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

"disaffection" imports disgust and discontentment, ill will, disloyalty, and hostility, toward an authority to whom respect, obedience, and allegiance is due. *Id.*

He charged that prejudice had to be "reasonably direct and palpable," A. 627; that the word "design" "means a specific intent," A. 628; and intent could be inferred from "the natural and probable consequences of any act purposely done." A. 637.

The Government by not mentioning the "public" requirement for proof of the offense, Brief for Appellants, at 39, n. 15, seems to concede that Dr. Levy was not convicted for making "public" statements. But earlier the Government flatly states that the "utterances were 'Publicly' made." *Id.* at 37. Regardless of the Government's current position on the elements of the "crime," *the law officer deleted this element from his charge even though the Manual upon which the Government relies for its proof of notice of military "customs and traditions" and under which Dr. Levy was tried, included it, MCM ¶213d(5) (1951) (Cf. MCM, ¶213f(5) (1969), which deleted this term) and it was included in the specification charged. App. 7.*

Additionally, there was no evidence that there were any "public" statements as "public" is used in Army Regulation 600-20, ¶42, quoted *supra*. Dr. Levy spoke to persons, conversationally, in his office; the Government previously conceded that he "did not make soap box speeches or print his views and comments in the newspapers," but, even though the letter which was the basis of the letter charges was mailed to but one person and Dr. Levy's comments were made in his dermatology clinic office *with the door sometimes open*, it con-

tended that "the circumstances under which he uttered these statements were public as contrasted to private." A. 1335.

Throughout this case the Government and the military have contended that there is no "significant risk that the Article will be used to punish officers for the private expression of ideas." Brief for Appellants at 47. The difficulty with the Government position is that it has not defined "private" *in this Court* let alone in the military law system. Indeed, if the Record here does not disclose "private" *conversations* then only a whisper, softly spoken, offers military personnel an appropriate tone of speech, an enclosed telephone booth a proper setting.

The words "directly and palpably" as used by the law officer were surplusage and added nothing to the definition of the offense. And here the prosecution proved no actual prejudice to good order and discipline.

The "design" requirement similarly adds nothing.³²

³² The "intent" aspect illustrates the law officer's and prosecutor's total misapprehension of the very basis of criminal responsibility. Since intent had to be proved, a standard for weighing evidence was sought. Absent incompetency or duress, one's words are usually spoken "willfully." But

LAW OFFICER: Well, I think the Government's position is that you pour into those words a culpable or gross disregard for the consequences of their utterance. In other words, the tendency to promote disloyalty.

.....
LAW OFFICER: You see the culpable thing here . . . is a mental operation in the accused's mind. You can never depart from that, because the words themselves objectively have—are just words. A. 472(a)-73.

The charge to the court included lesser offenses based on various manslaughter-negligence type standards. And the two letter charges were dismissed because the court found Dr. Levy guilty "with culpable negligence" instead of "with intent." A. 645.

See, e.g., *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970). As Judge Robinson said in *Stolte v. Laird*, 353 F. Supp. 1392, 1405 (D. D.C. 1972):

Most statements are intended to promote some thoughts on the part of the listener, and such design or intent is implicit in most forms of human communication. If the communication itself is deemed to be disloyal, it easily follows that it was intended to promote disloyal thoughts among the listeners. Thus, the finding of the requisite intent can be, and has been [citation omitted] established simply by virtue of the fact that the statement found to be disloyal was communicated to other military personnel. The intent element of the specification is thus deprived of any independent vitality and made to turn upon the finding of whether the initial statement was disloyal.

The Government contends that the exigencies of military life require the abandonment of the clear and present danger test of *Schenck v. United States*, 249 U.S. 47, 52 (1919). In Brief for Appellants at 33, it refers to its quote from *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338 (1972), printed in its Brief in *Arrech*, at 20. The Government states that this quotation means "essentially speech must be limited which has a clear *tendency* to 'undermine the effectiveness of response to command.' " Brief for Appellants at 33-34. [Emphasis added.] But on the full page from which the Government quotes, 21 U.S.C.M.A. at 570, we find:

The proper standard for the governance of free speech in military law is still found, we believe, in Mr. Justice Holmes' historic assertion in *Schenck v. United States*, 249 U.S. 47, 52 (1919), that:

... The question in every case is whether the words used are used in such circumstances and are

of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The Government if relying on *Priest* should concede that the military at least provides lip-service to the *Schenck* standard. Since it failed to apply that standard to Dr. Levy, the Government cannot consistently argue that his conviction was properly had under even military law.

The Government, arguing for a "clear and reasonable tendency" test, states that this is a "standard instruction." Brief for Appellants at 39, n. 15. Since it also argues that speech trials under Article 134 are limited since "of more than 70 different offenses which Article 134 [now] covers; only five of those involve speech or writing," *Avrech*, Brief for Appellant at 23 [footnote omitted], cases such as this must be novel. Thus, the alleged standardness of the instruction appears doubtful, and of course, the Government's principal authority, *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972), indicates the opposite is true.

The law officer's charge to the court, particularly the definitions of "disloyalty" and "disaffection," leaves no doubt that the court and the law officer had no standard by which to judge Dr. Levy's words. They employed a license to create their own standard for guilt. This has been uniformly condemned. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-04 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

Here, under the law officer's charge, once Dr. Levy was found to have "uttered" a comment to a member of the armed forces he was subject to conviction if the uttered words were "disloyal" or "disaffectionate." Each element of the "offense" shrieks of vagueness and redundancy. After hearing the evidence and the law officer's charge, neither Dr. Levy nor those who judged him could have discerned the elements of the crime he allegedly committed; after conviction they could be certain that he had been found guilty of "uttering" words.

B. Additional Charge I (Under Article 133)

Here Dr. Levy was not accused of speaking "to the prejudice of good order and discipline" of the Army, but of speaking words unbecoming officers and gentlemen and thereby bringing "dishonor and disrepute" upon himself and, thereby, the Army. The words were the same, the charges different. Here he also was convicted without evidence under Article 133.³³ Here there was no evidence "to bring dishonor or disrepute" to Dr. Levy as an individual and an officer, or to "the military profession which he represents," the military law elements conviction required. A. 631. The Army specified that Dr. Levy's words were:

- (1) Intemperate, defamatory, provoking and disloyal . . . ;
- (2) Intemperate and disloyal . . . ;
- (3) Intemperate, contemptuous and disrespectful . . . ;
- (4) Intemperate, defamatory, provoking and disloyal App. 8.

³³ The law officer's Article 133 charge to the court-martial is set out at A. 630-33. The specification is found at App. 8.

These too are strong, and, of course, vague words. The statements Dr. Levy was charged with making were to Army personnel. Thus, the "Army image" elements of the offense—"dishonor or disrepute" to the Army—remain unproved. Since the "offensive" statements were not made on a "soap box" but were within the Dermatology Clinic, they were heard only by Army personnel who, to adopt Government reasoning, knew the "Army image" at least as well as Dr. Levy. Since the prosecution offered no "repute" evidence (the only Record evidence regarding Dr. Levy's reputation is that it was excellent) and the law officer did not dismiss this charge, the court members were once again left free to set their own abstract standards of judgment. Again, such standard-setting in pure speech cases has never been permitted by this Court.

IV. THE REJECTION OF TRUTH AS A DEFENSE TO PURE SPEECH CHARGES ARISING FROM COMMENTS ON THE CONDUCT OF THE VIETNAM WAR AND WAR CRIMES RESULTED IN THE DEPRIVATION OF FIRST, FOURTH, FIFTH AND SIXTH AMENDMENT RIGHTS.

Dr. Levy, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964), interjected truth as a defense to the four pure speech charges.

Garrison, supra, 379 U.S. at 74, held:

Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.

Here one of the alleged statements was:

Special Forces personnel are liars and thieves

and killers of peasants and murderers of women and children.

The law officer ruled:

. . . A *subjectively held belief in the truth* of the various statements allegedly made by the accused in these charges, is no defense to a charge of publicly uttering words with a design to promote disloyalty and disaffection among the troops. [Emphasis added.] A. 464.

Now, *the objective truth of the statements* allegedly made by the accused *is really not in issue* in this case. *Practically all of these statements are merely expressions of opinion*; expressions that become criminal only when attended with a design to promote disloyalty and disaffection among the troops, or under such circumstances that palpably prejudice good order and discipline in the Armed Forces. [Emphasis added.] A. 465.

The accused's statements as alleged, again, are basically expressions of opinion whose truth or falsity is hardly relevant. The inquiry in this case is and must be not their truth or falsity, but were these statements uttered with a design to promote disloyalty, and did they have a reasonable and natural tendency to do so. [Emphasis added.] A. 466.

Even if a person is subject to criminal sanctions for his words, if what he said was objectively true, that truth cannot be considered "irrelevant." But, as the law officer said "as long as that Army won, I suppose" such true speech may be punished. A. 473. Thus, Dr. Levy was deprived of the truth defense. The problem became even more difficult for the law officer when Article 133 was considered.

INDIVIDUAL COUNSEL: Could the question of truth go to the question of it being dishonorable?

LAW OFFICER: I wonder about that. Both subjective and objective?

INDIVIDUAL COUNSEL: Yes, sir. Could a man be dishonorable who speaks the truth? A. 474.

The prosecutor answered:

[T]he law officer has already ruled for the purpose of this hearing, the commitment of the United States Forces in Vietnam is legal for the purpose of these proceedings. How can one say that the United States is wrong in Vietnam, if it has an objective reality apart of these proceedings? There can be no measure of truth or falsity to that that would have any relevance to this proceeding.

LAW OFFICER: I don't see where truth is really an issue here. A. 475.

This ruling permitted a criminal conviction in direct conflict with *New York Times v. Sullivan* and *Garrison v. Louisiana*, *supra*.

When this Court has permitted "disloyalty" prosecutions, convictions have never been allowed on the mere utterance of true words. *E.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (requiring clear and present danger); *Dennis v. United States*, 341 U.S. 494 (1951) (intent to incite forceful and violent action as speedily as circumstances permit); *Yates v. United States*, 354 U.S. 298, 329 (1957) (record "strikingly deficient" as to actual advocacy of anything but abstract doctrine). Thus even if the elements of the offense were proved, they were constitutionally deficient.

V. THE ORDER TO A MEDICAL OFFICER TO TRAIN SPECIAL FORCES AIDMEN WAS VIOLATIVE OF ACCEPTED STANDARDS OF MEDICAL ETHICS AND IN VIOLATION OF THE FIRST, THIRD, FOURTH, FIFTH, AND NINTH AMENDMENTS.

The defense of medical ethics was ruled admissible only in extenuation and mitigation and not as a defense to the lawfulness of the order. *Cf. Whelchel v. McDonald*, 340 U.S. 122 (1950). According to the *Manual for Courts Martial*, ¶169b (1951):

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. . . .

A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of a *military duty* is presumed to be lawful and is disobeyed at the peril of the subordinate.^[34] Acts involved in the disobedience of an illegal order might under some circumstances be charged as insubordination under Article 134. [Emphasis added.]

The Oath of Hippocrates "represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Roe v. Wade*, 410

³⁴ The burden of proof is thereby shifted to the defendant. It should be noted that the presumption here is not statutory. "... [I]ncriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit." *Morisette v. United States*, 342 U.S. 246, 275 (1952). Compare, *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965).

U.S. 113, 131 (1973). The Oath states:

I swear . . . that, according in my ability and judgment, I will keep this . . . stipulation . . . that by precept, lecture and every other mode of instruction, I will impart a knowledge of the art to . . . disciples bound by a stipulation and oath, according to the law of medicine but to no others. . . . [W]hatever . . . I may see or hear in the lives of men which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret. A. 551.

Compare that Oath to the testimony of the Colonel who originated the Aidman program:

. . . [I]n a struggle like this which is in many respects a social struggle that we have got to turn to the use of social instruments such as medicine. So in this way we sought to use medicine as a means of approaching the enemy and imposing our will on his. A. 559.

Q. Now you discussed the political use of medicine. That merges into a military use of medicine also, doesn't it?

A. Certainly. The military is after all only a political instrument. R. Vol. 7, p. 2154.

Dr. Victor W. Sidel, of the Harvard Medical School, testified that a physician's decisions on medical ethics must be made on medical, not political or military grounds. A. 579, 587.

Yet Dr. Levy was ordered to train combat troops—who, unlike medical corpsmen and others covered by the Geneva Convention, were “basically a soldier and an aidman as a secondary occupation,” A. 506—to

serve as quasi-physicians without medical supervision in Vietnam.

In addition to an ethical responsibility to work to preserve human life and to teach medicine only to medical as opposed to combat personnel, Dr. Levy also had an ethical responsibility not to reveal the confidences of his patients.

The Principles of Medical Ethics of the American Medical Association states:

A Doctor "should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care." He "... may not reveal the confidences entrusted to him ... unless he is required to do so by law or unless it becomes necessary to protect the welfare of the individual or of the community." American Medical Association, *Opinions and Reports of the Judicial Council VI-VII* (1964).

The order to Dr. Levy required his Special Forces "students" to have some experience concerning "... Gonorrhea, Chancroid, Granuloma inguinale, Preparation of smears for bacteriological study, Gram staining method, and Identification of gram negative and gram positive organisms." R. Vol. 10, Pros. Exh. 2.

The order to Dr. Levy was issued in the face of a Technical Bulletin which provided that:

Every patient diagnosed as having venereal disease will be interviewed Information on contacts is reported to appropriate medical investigative agencies *Information contained in these reports will not be disclosed to other than medical or health agencies without the patient's consent.* T. B. Med.

230, Treatment and Management of Venereal disease. 7 July 1965, Sec. I 3 d (2). [Emphasis added.]

And Army Regulation 40-554, ¶5, itself provided:

The patient will be advised that the information derived from the venereal disease contact interview and entered on the venereal disease epidemiologic report will be used only by *health agencies* authorized to locate, examine and treat the named contact and otherwise will be held in strictest confidence. [Emphasis added.]

After Dr. Levy's refusal to allow Special Forces to view his patients, another physician disregarding all medical ethics concluded the training. Without her consent, a female dependent was used to educate Special Forces "students" as described below.

Well, I had an appointment on January 17th at the dermatology clinic, and Captain Levy was not there. They had Dr. Allison in his place; and when I went in the room, I handed him my records, and all the special forces was in the room. He asked me where my trouble was. I told him below the waist, below my belt, and on my legs. He asked could I show him without going to the examination room. I did not make an answer whatsoever; I gave him a dirty look. So he sent for the sergeant to get a nurse. So when the nurse came, I went in to undress, and told her the story of what Dr. Allison had said to me. So then, thinking Dr. Allison would be the only one coming in to examine me—it was Dr. Allison, Dr. Caras, and eight or ten Special Forces men.

....

Well, I was undressed. He pulled the sheet down, looked at it, showed those men the private part of my body, and said those dark spots were cold

spots or nerves or some other name—some medical name I don't know. R. Vol. 6, p. 1098.

The law officer refused to instruct the court that if they found that Special Forces was not a medical or health agency and that Special Forces Aidmen would have learned the names of venereal disease contacts in the training program (a dead certainty) then the order was unlawful. R. Vol. 18, App. Exh. 24.

The sanctity of the doctor-patient relationship has constitutional protection. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *Doe v. Bolton*, 410 U.S. 179, 197 (1973). But the sanctity of Dr. Levy's patient relationships and medical ethics was ruled irrelevant.

Indeed, the privacy and conscience of all citizens are within the protection of the Constitution. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Clay v. United States*, 403 U.S. 698 (1971). As was said in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), a first amendment religion case:

[I]n this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530 [1945].

And in *Thomas v. Collins*, *supra*, 323 U.S. at 531, Mr. Justice Rutledge said:

The First Amendment gives freedom of mind the same security as freedom of conscience. [Citation of authority omitted.] Great secular causes, with small ones, are guarded [T]he rights of free speech and a free press are not confined to any field of human interest.

Here, where medical training violative of a physician's ethical concepts was sought, it was "... incumbent upon the [military] to demonstrate that no alternative forms ... would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, *supra*, 374 U.S. at 407.

An "alternative form" in the person of another physician who did not have Dr. Levy's ethical concerns might have been feasible. The record does not disclose that this means of avoiding an infringement of Dr. Levy's ethical precepts was attempted. Instead the Army simply ignored the precept, ordered and then court-martialed the physician, refusing to allow him the defense of medical ethics because its *Manual* did not allow for it.³⁵ Compare: *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 164-65 (1944). Mr. Justice Clark, writing for the Court in *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoted with approval the language of Harlan Fiske Stone, later Chief Justice:

[B]oth morals and sound policy require that the state should not violate the conscience of the individual [N]othing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which

³⁵ Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to such information or to statements made to them by patients. MCM, Rules of Evidence, §151c(2) (1951).

See also *Military Justice Evidence*, DA PAM 27-172, p. 342 (June 1962); *United States v. Shaw*, 9 U.S.C.M.A. 267, 269, 26 C.M.R. 47 (1958), (the contention for the psychiatrist-patient privilege is "contrary to the Manual.")

preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process. Stone, *The Conscientious Objector*, 21 COL. UNIV. Q. 253, 269 (1919).

See also Chief Justice Hughes, dissenting in *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (joined by Justices Brandeis, Holmes, and Stone).

The Government does not contend that Dr. Levy's ethical beliefs were "incorrect"; in light of the expert testimony (Dr. Jean Mayer, then of the Harvard Medical School faculty and more recently a Special Consultant to President Nixon and Chairman of the White House Conference on Food, Nutrition and Health, A. 566-77; and Dr. Victor W. Sidel, of the Harvard Medical School faculty, A. 577-91) that a decision not to train Special Forces Aidmen was consistent with and even demanded by medical ethics, the Government could not contend otherwise. The Government contends only that it does not recognize the defense.

Poe v. Ullman, 367 U.S. 497 (1961) involved the giving of medical advice, advice considered reprehensible by many persons on moral and religious grounds. Dr. Levy refused to impart advice and medical knowledge to Special Forces Aidmen on the same ground that Dr. Poe desired to impart birth control knowledge to his patients. Each felt professionally and ethically that as physicians their duty lay in their imparting or refusing to impart medical knowledge in accordance with standards of ethical medicine.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the statute attacked in *Poe* was declared unconstitutional. Even the dissent of Mr. Justice Black, 381 U.S. at

507-08, applies here for Dr. Levy was charged merely with the failure to do an act (and with the expressing of opinions, albeit on political subjects as well as medicine). There was no conduct. See also, Mr. Justice Stewart dissenting, 381 U.S. at 529, n. 3. Dr. Levy's ethical beliefs were entitled to protection from the state and recognition by the Army; he should not have been subjected to a criminal sanction.

VI. THE DEFENSE TO THE ORDER CHARGE THAT SPECIAL FORCES AIDMEN WERE COMMITTING WAR CRIMES WAS ERRONEOUSLY EXCLUDED BY THE LAW OFFICER.

The law officer soon was to make short shrift of the ethics defense. He had ruled truth irrelevant to the pure speech charges. Thereafter, truth became a defense *to the order charge*, the law officer saying:

Now the courts, both military and civilian, have evolved a rule that there exists a presumption that the order of a superior is legal, and that the subordinate disobeys it at his own risk. In this case, the order to train special forces aidmen is legal on its face. Now the defense has intimated that the special forces aidmen are being used in Vietnam in a way contrary to medical ethics. My research on the subject discloses that perhaps the Nuremberg Trials and the various post war treaties of the United States, have evolved a rule that a soldier must disobey an order demanding that he commit war crimes, or genocide, or something to that nature. A. 465.

"Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children," App. 7, became, if true, a defense to the order charge. The ruling meant an Army officer must decline

to obey a "war crimes order" but he must risk defending against an Article 90 charge, bearing the burden of proof of illegality. But even if he is certain enough of the occurrence of war crimes to decline an order, he must not speak of these crimes, for truth is no defense for his speech.

The law officer expressed concern with Dr. Levy's phrase, A. 492-99, a phrase the truth of which seemed subject to judicial notice even in the mid-1960s for, excluding North Vietnamese troops, the struggle in Vietnam was against the Viet Cong, who were "peasants," "women," and "children." But the law officer said, "... I am almost ready to take judicial notice that they are not [engaged in war crimes]." A. 496.

So the defense sought to produce the "some evidence" of war crimes which under military law made submission of the defense to the court mandatory. An out-of-court hearing was held.

The Law of Land Warfare, Field Manual (FM) 27-10 (1956), defines war crimes as "a violation of the law of war by any person or persons, military or civilian." *Id.* ¶499. Thus, by use of the Army's own rules the proof was presented.³⁶

* This manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the texts of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. *However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.* *Id.* ¶1. [Emphasis added.]

The law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed Forces. *Id.* ¶3b.

Compare the Government's reliance on the MCM and "custom and practice" to show General Articles' notice to bolster the pure speech charges.

Witnesses Robert L. "Robin" Moore, author of *THE GREEN BERETS* and a pro-war, pro-Special Forces observer in Vietnam, Captain Peter G. Bourne (then of the Walter Reed Army Institute of Research, now Assistant Director of the White House Office of Programs, Special Action Office for Drug Abuse Prevention), who had studied Special Forces A-Teams in Vietnam, and former Special Forces Sergeant Donald W. Duncan testified that they had actually been in a majority of the Special Forces A-Team encampments in South Vietnam and knew the patterns and practices there. See R. Vol. 5, pp. 959, 991-92, R. Vol. 6, p. 1021. Then the defense without contradiction proved violations of *The Law of Land Warfare*, ¶31 (forbidding assassination and bounty); *id.* ¶34b (use of weapons causing unnecessary injury); *id.* ¶¶56, 58, 393, 397, 448, 502 (outlining offenses against property and civilians and the mass transfer of civilians); *id.* ¶¶266, 433 (mistreatment of civilians); *id.* ¶¶270, 502 (impressment of local inhabitants); *id.* ¶¶85, 88, 89 (regarding treatment of prisoners); *id.* ¶504 (treatment of dead bodies—the collection of ears and payment of bounty thereon).³⁷ Additionally, the record is replete with references to the guerrilla and clandestine warfare activities—indeed, duties—of Special Forces Aidmen. See *e.g.*, Statement, *supra*, pp. 4-9.

"Complicity," *id.* ¶500, was demonstrated, see, *e.g.*, Greenspan, *MODERN LAW OF LAND WARFARE*, at 467-87 (1949) and cases cited therein. *Cf. In Re Yamashita*, 327 U.S. 1 (1946).

³⁷ The foregoing references include "texts of treaties to which the United States is a party."

Then the law officer ruled:

... I know of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States. Disposition of troops under our constitution is peculiarly [*sic*] an executive power and not a judicial one. A. 466.

While there have been perhaps instances of needless brutality in this struggle in Vietnam about which the accused may have learned either through conversations or through publications, my conclusion is that there is no evidence that would render this order to train aidmen illegal on the grounds that eventually these men would become engaged in war crimes or in some way prostitute their medical training [the testimony on the medical ethics defense came later] by employing it in crimes against humanity. A. 523.

The law officer did not rule that Special Forces were or were not, in fact, engaged in the commission of war crimes. He simply refused to allow the defense, which he had previously ruled valid, to go to the court.

The opportunity to demonstrate the illegality of the order was crucial. The law officer recognized this when he conducted an out-of-court hearing. He erred in applying the facts to the standard of proof.

Under military law the standard of proof required for *submission of an issue to the fact-finders* is "some evidence." See, *United States v. Evans*, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); *United States v. Moore*, 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966); and *United States v. Kuefler*, 14 U.S.C.M.A. 136, 33 C.M.R. 348

(1963). Dr. Levy's documentation of over 3,000 specific examples of war crimes³⁸ and the testimony of witnesses Robert L. Moore, Jr. (A. 508-17), Donald W. Duncan (R. Vol. 6, pp. 1011-26) and Captain Peter G. Bourne (A. 504 and R. Vol. 5, pp. 991-96) clearly and surely met the "some evidence" test.

It is now public knowledge and publicly acknowledged that war crimes were committed by United States troops in Vietnam. And the common question now asked is not "Were they committed?", but "Who, if anyone, shall be held responsible?" Dr. Levy accepted his responsibility. For that—and for talking about war crimes and civil rights—he was jailed. And, at his trial he was denied the opportunity to present the war crimes defense to the court. In this he was denied due process of law. And under *Whelchel v. McDonald*, 340 U.S. 122 (1950), the order charge conviction must be set aside.

The law officer knew of "no court, civilian or military," that would sit in judgment of war crimes. He well might have considered the words of Mr. Justice Murphy, dissenting in *Yamashita*.

The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedures sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. *In Re Yamashita*, 327 U.S. 1, 28 (1946).

³⁸ See R. Vol. 17, Appellate Exhibits 19A-19E, reproduced at A. 158 to A. 293.

Dr. Levy refused to provide advanced medical training to combat troops whose duty was to employ their knowledge as political and military weapons and to kill. He was by force of the Government an Army Captain, standing mid-way between the sergeant and general of Mr. Justice Murphy's dissent. He refused to be implicated in the use of medicine as a weapon and was jailed. That jailing was contrary to military law as well as the Constitution of the United States.

VII. THERE IS NO MILITARY NECESSITY NOR CONSTITUTIONAL JUSTIFICATION FOR NOT PROVIDING THE ACCUSED IN MILITARY TRIALS THE SAME RIGHT OF REVIEW OF CONSTITUTIONAL ERRORS AS IS AVAILABLE TO CIVILIANS.

If there was ever any justification for Article III courts to defer to military judgment in criminal cases, the justification has passed. It was always questionable.³⁹

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

And as was said in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955), "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end

³⁹ Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943).

proposed.' " [Emphasis in original.] [Quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31, 5 L.Ed. 242 (1821).]

Historically this Court has deferred to military judgment. But an examination of this Court's "deference cases" shows clearly that the very basis for deference has passed, even apart from the development of the overbreadth doctrine.

Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1858), found that the Navy General Article suffered "apparent indeterminateness" but was "not liable to abuse" because the crimes and punishments were "well known by practical men in the navy and army." This conclusion was more fully expounded in *Smith v. Whitney*, 116 U.S. 167, 178-79 (1886):

Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. This is nowhere better stated than by Mr. Justice Perry in the Supreme Court of Bombay saying:

. . . [T]he mutiny act and articles of war do not alone constitute the Military Code. . . . [The] procedure is founded upon the usages and customs of war, upon the regulations issued by the sovereign, and upon old practice in the army, as to all which points common-law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. (Quoting from *Porret's Case*, Perry, Orient. Cas. 414, 419.)

United States v. Fletcher, 148 U.S. 84 (1893), added

nothing more to the law;⁴⁰ and no subsequent case bolsters the bare conclusion found in *Smith v. Whitney*. See, *Ex Parte Quirin*, 317 U.S. 1 (1942); *Carter v. McClaghry*, 183 U.S. 365 (1902); *Swaim v. United States*, 165 U.S. 553 (1897).

The Government argues that military personnel understand their criminal liabilities because they are in the military, and only they understand their customs. But, if Dr. Levy did not understand those customs, the Government argues that he should have referred to the *Manual* to resolve doubts. Brief for Appellants at 38. Thus Dr. Levy was to turn to some of the very writings upon the non-existence of which the ruling in *Smith v. Whitney*, *supra*, was premised. Regardless of whether an untrained physician "Berry-planned" into the status of officer and gentleman may be presumed to have read law prior to engaging in a conversation or the practice of ethical medicine, judges and lawyers are presumed to read law in the course of their work. Military "customs" are now reduced to writing and, from the *Manual*

* The court of appeals below commented that the disposition of the challenge to the statute in *Fletcher* "can only be characterized as an incredibly conclusory manner . . . hardly ris[ing] to the stature of unshakable constitutional dogma." J.S.A. 28a.

Fletcher adds a vagary onto which the Government latches, in that the opinion affirmed a decision from the court of claims which commented:

In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (1891).

From this language the Government argues that if the military is compelled to write out its criminal code solely to avoid vagueness and overbreadth, its high code of honor will be lowered to that of a criminal code. Nothing compels the writing of codes at any particular level of behavior; the Government's argument is a *non sequitur*.

to reams of regulations to ease reports of military courts to the written UCMJ, civil court judges can acquire military knowledge.⁴¹

Congress now requires that the members of the Court of Military Appeals be "appointed from civil life." 10 U.S.C. §867 (a) (1).⁴² Additionally, any extension of trial by military authority is only "grudgingly conceded" in our system, *Reid v. Covert*, 354 U.S. 1, 23 (1957), for "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). Indeed, the thrust of learned commentary is to civilianization of the military law system. See e.g., Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

Of overriding importance is the existence in our society of more than 30,000,000 veterans of military

⁴¹ There can no longer be a reason for not writing a criminal code to meet due process-notice requirements as the Constitution commands. Indeed, many who see difficulty in this seem to be saying that the writing of a code with due process-notice specificity is too difficult a task. If such a code is too difficult to write then "military law and customs" must be too difficult, while unwritten, for even lawyer, let alone non-lawyer, military personnel to understand.

⁴² And, of course, review in some instances is had by the Secretary of the service branch involved and the President. 10 U.S.C. §867 (f).

The extent to which this concept of deference to military knowledge is illogical is illustrated by *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964). The ingenious Sadinsky found a mode of conduct not prohibited by any general order or regulation—he did a back flip off an aircraft carrier. The Navy Board of Review (military) dismissed for failure to state an offense under Article 134. The civilian Court of Military Appeals reversed these military men and upheld the conviction. Thus even where military men were unsure of whether Article 134 could reach particular conduct the civilian appellate court provided the answer.

service. It is hardly possible to draw a civilian jury on which all or many of the male members of the panel are not veterans. Indeed, on this Court there are four former commissioned officers, a former sergeant and a former private first class. Thus the reason for the rule of *Smith v. Whitney, supra*—in the Supreme Court of Bombay's phrase "common-law judges have no opportunity, either from their lawbooks or from the course of their experience, to inform themselves"—no longer exists.

The exemption of the American military from the commands of the American Constitution seems as out-of-step with modern day reality as the military's failure to seek statutes requiring that its personnel be fairly advised of the conduct expected of them under familiar rubrics already established by the decisions of this Court.

VIII. THE GENERAL ARTICLES ARE NOT SUPPORTABLE UNDER THE FIRST AND FIFTH AMENDMENTS. THERE IS NO MILITARY NEED OR NECESSITY JUSTIFYING INFRINGEMENT OF THE RIGHTS GUARANTEED THEREBY. THE RECORD HERE ILLUSTRATES THE CONSTITUTIONAL DEFECTS.

A. The General Articles Are Unconstitutional.

Article 133 reads:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 reads:

Though not specifically mentioned in this chap-

ter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

On their faces, the General Articles not only fail to define crimes, they do not even purport to do so. They are but jurisdictional statutes.

There can be no supportable contention that these statutes are not vague. Article 134 has always been vague and intentionally so. *Reid v. Covert*, 354 U.S. 1, 38 (1957), characterized this Article as an example of "harsh law which is frequently cast in very sweeping and vague terms."⁴³

THE LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES (1951) contains an illuminating discussion of Article 134. In explaining "conduct of a nature to bring discredit upon the armed forces," this history of the 1951 *Manual* states "[t]his is the 'catch-all' in military law." *Id.*, p. 294. It explains that the Article was added to the code to provide the military with jurisdiction to try non-commissioned officers and soldiers who are re-

⁴³ And see John O'Brien (1st Lt., U.S. Army), *A TREATISE ON AMERICAN MILITARY LAWS* (1846). In speaking of the forerunner to Article 133, the author said, "The wording of this article is very vague. . . . We are forced then to go beyond the letter of the article to arrive at its true meaning." *Id.*, p. 158. The discussion went only to show that conduct must be unbecoming both as an "officer" and a "gentleman" to be an offense.

tired. (Article 133 already provided the Army jurisdiction to try retired officers.) *Id.*, p. 295. It is explained further:

By judicial interpretation these "vague words" have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline. *Id.*

Colonel William Winthrop's definition of Article 133 is cited to "flesh out" the offense.

"Unbecoming," as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbecoming and unworthy.

"Gentleman." So, *this* term is believed to be used, not simply to designate a person of education, refinement and good breeding and manners, but to indicate such a gentleman as an officer of the army is expected to be,¹⁴ *viz.* a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment. Winthrop, *MILITARY LAW AND PRECEDENTS*, p. 711 (2d ed., reprinted 1920). [Emphasis in original; footnote omitted.]

And then, with a single footnote from this primary source of the Government's argument, Colonel Winthrop proceeds fundamentally to undermine the Government's case. For footnote 14 reads in part:

It is said by DeHart, (p. 372) that—"the military

community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society." But they may fairly be expected to preserve one which is in no lower degree. See G.O. 41 of 1852, p. 5. *Id.*

Thus Winthrop did not contend for a "higher code termed honor." He did say if the military officer's conduct fell below that of the civilian population he could be held criminally liable (whereas a civilian could not).⁴⁴ Winthrop further defined the conduct constituting an offense under Article 133:

Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents. Winthrop, pp. 711-12. [Footnotes omitted.]

The *Manual's* discussion of proscribed conduct has remained unchanged since 1886 (Winthrop's first edition). J.S.A. 34a, n.24. See ¶ 212 of the 1969 *Manual*. The law officer's instructions to the court substantially followed ¶ 212, the key words being:

action or behavior in an official capacity which, in *dishonoring or disgracing the individual* as an offi-

⁴⁴ The Government misreads Winthrop or by omission leaves an incorrect impression. Winthrop points out that the 1775 version of the Article read "convicted . . . of behaving in a scandalous, infamous manner, such as is unbecoming," etc. The words of limitation, "scandalous, infamous manner," were deleted in 1806. Thus the effect was "to extend materially the scope of the Article, and thus indeed to establish a higher standard of character and conduct for officers of the Army." Winthrop, pp. 710-11. As the text quoted above makes clear, the standard for which an officer became culpable was raised (it no longer had to be scandalous or infamous), but not above the level of conduct of a civilian "gentleman."

cer, seriously compromises his character as a gentleman. . . . [T]he act . . . *must have a double significance and effect . . . , it must offend so seriously against justice, law, morality or decorum as to expose to disgrace, socially, or as a man, the actor. Additionally, the act must . . . bring dishonor or disrepute upon the military profession which he represents. Further, unbecoming . . . mean[s] not merely inappropriate or unsuitable, as being opposed to good taste or propriety, or not consonant with usage, but morally unbefitting and unworthy.* A. 631. [Emphasis added.]

Dr. Levy, in his official capacity, must have so "dishonored" or "disgraced" himself that his own character was seriously compromised. But the witnesses had praise for his character. *E.g.*, R. Vol. 7, pp. 2342-51. The record is barren of evidence to the contrary.

Also, he must so seriously have offended "decorum" as to disgrace himself as a man. Here again, there is no proof. No offense against "law," "justice" or "morality" is alleged or raised by the proof.⁴⁵ Indecorum cannot be constitutionally prohibited. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967) (three-judge court), but it is the only one of the four words that the specification under this charge could conceivably refer to.

Additionally, he must have brought "dishonor or disrepute upon the military profession which he represents." The prosecution offered no evidence that the

⁴⁵ See *Commercial Pictures Corp. v. Regents of University of New York*, 346 U.S. 587 (1954), reversing, on the authority of *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), a finding that "immoral" conduct was properly regulated by administrative officials. When New York defined "immoral" it was held to violate the first amendment. *Kingsley Int'l Pictures Corp. v. Regents of University of New York*, 360 U.S. 684 (1959).

Army had suffered any loss of public esteem because of Dr. Levy's statements. Further, he must have offended not merely "good taste or propriety," but must have been "morally unbefitting and unworthy." The culpable terms—"decorum," "law," "justice," or "morality"—were used in the disjunctive. If any one term is constitutionally deficient, Dr. Levy's conviction cannot be sustained. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Street v. New York*, 394 U.S. 576 (1969).

The court of appeals was clearly correct in declaring it could find no standards by which to judge conduct. The danger was compounded, it observed, when the application of such a statute was transposed to a military setting. J.S.A. 42a. It cited *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972) for the following:

[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Footnotes omitted.]

That, of course, is the danger here, along with denial of due process through lack of notice. And to what was the soldier to look in 1966 for an "authoritative interpretation" that Articles 133 or 134 would apply to Dr. Levy's speech? The Government points to no cases from the military courts. It cites to the 1969 *Manual*, ¶213f(5), and correctly notes as an example

"utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States. . ."
Brief for Appellants at 38.

The *Manual* under which Dr. Levy was tried had one important word deleted from the 1969 *Manual*:

Examples are *public* utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government. MCM ¶ 213d (5) (1951). [Emphasis added.]

The "public" aspect of the charge was deleted by the law officer who charged the court that it could delete the words "in public" if it found the statements arose not in public or keep them in if it found otherwise. A. 628. The court's finding was simply "Guilty." A. 644.

Three examples in an administrative guidebook do not constitute an "authoritative limiting construction," especially when even those examples were not followed in the prosecution. They add nothing to the definition of disloyalty or disaffection.

The ever-expanding number of offenses listed in the *Manual* for Article 134⁴⁰ underscores the arbitrary nature of the statute's use. As the court of appeals below concluded, "It becomes readily apparent . . . that at best the *Manual* includes but a compilation of those offenses previously determined by various courts-martial to come within the breadth of Article 134." J.S.A. 38a. A list of examples is a poor basis on which to judge what else shall be proscribed in the future. When the military courts decide a case, they deal with the specific situation before them and their discussion adds little by which to assess other conduct. Typical is the decision in *United States v. Frantz*, 2 U.S.C.M.A.

⁴⁰ In 1967 there were "more than fifty different offenses ranging from abusing public animals to wearing an unauthorized insignia." J.S.A. 36a. See also, *id.* 38a, regarding the expansion.

161, 7 C.M.R. 37 (1953). The accused was convicted under Article 134 of "deceitful possession" of a false liberty card. The conviction was affirmed on the grounds that the possession "constituted a deliberate flaunting of the requirement that liberty cards be duly and properly authenticated" and of the authority "to issue such documents." *Id.* at 162-63. This decision, which is the landmark military authority for the proposition that Article 134 is not vague, sought to explain the military necessity which justified the decision.

[T]he briefest of terminal references must be made to the presence of special and highly relevant considerations growing out of the essential disciplinary demands of the military service. These are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development. *Id.* at 163-64.

No logical mind can contend that this language provides further notice to the serviceman by which to assess his "conduct" let alone his conversation.

Since the source of offenses under the General Article is administrative (listed in the Table of Maximum Punishments; appendix 6 of the *Manual*; done in "the discretion of minor executive or military officials," *Levy v. Corcoran, supra*, 389 F.2d at 932 n.2) (dissenting opinion), that alone is sufficient ground for affirming here. Our system rebels at the defining of criminal offenses by other than direct legislative action, and while criminal offenses have occasionally been defined in other manners, *e.g.*, tax regulations, administrative defining of criminal offenses should be sustained only when the most compelling reasons justify the delegation of this

power. The administrative defining here is an unconstitutional abridgement of the separation of powers.

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers. *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

The military recognizes this:

[I]nclusion [in ¶ 213d and appendix 6c] of a specification for a particular act . . . is not what makes that act an offense. Offenses are denounced only by specific statute . . .—those which we are discussing, by Article 134—and there are necessarily many other acts which may constitute disorders or neglects, or conduct discreditable to the armed forces, which are not discussed or covered by any sample specification. LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES 296 (1951).

Nor is there any basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in the Congress alone the power "To make Rules for the Government and Regulation of the land and naval Forces." United States Constitution, Article 1, Section 8. *United States v. McCormick*, 12 U.S. C.M.A. 26, 28, 30 C.M.R. 26 (1960).

Since 10 U.S.C. §§ 836 and 856 direct the President to prescribe rules of procedure and evidence and maximum punishments, to the extent the *Manual* seeks to define crimes (or is utilized for this purpose) it is not

an unconstitutional delegation but a usurpation of power.

Rather than develop meaningful standards by which to judge conduct, the military courts have not deviated from (or improved upon) those codified by Winthrop's treatise.

Thus the Government is not able to offer delineating precedents. *Cf.*, *Wainwright v. Stone*, ____ U.S. ____, 94 S.Ct. 190 (1973) (elements of offense spelled out by prior case law).

The offense of uttering disloyal statements is inherently difficult of definition because the aims or policies of government are often secret and when publicly known are often in flux. They may be misunderstood or, if understood, disagreed with. The charges here well illustrate the problem. One of the offending utterances alleged was:

Are the North Vietnamese worse off than the South Vietnamese? I doubt it. Additional Charge II, App. 9.

How could fact-finders judge the culpability of such words, even if there were prior case law holding other words disloyal? The difficulty, of course, may not mean such words under some legal standards could never lead to conviction. It does mean that Dr. Levy had no standards by which to judge his speech. Dr. Levy's is the second reported military decision which dealt with disloyal statements. *United States v. Levy*, 39 C.M.R. 672 (ABR 1968).⁴⁷ The military courts here did not

⁴⁷ See, *United States v. Batchelor*, 19 C.M.R. 452 (ABR 1955) (the accused, a prisoner of war in Korea, wrote a letter to his hometown newspaper denouncing the alleged use of bacteriological (footnote continued on next page)

define Dr. Levy's offense. They merely concluded he was covered. His case does not even approach *Bowie v. City of Columbia*, 378 U.S. 347 (1964), where a conviction was flawed by the state court's construction of a statute, which although proper, made the statute applicable to the accused but did not do so before the case arose.⁴⁸

(footnote continued from preceding page)

warfare); there are subsequent cases which are of no help in defining disloyalty, e.g., *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

* At trial the overbreadth of the statutes, the charges, the specifications, and their vagueness led from one never beginning alley down an almost never ending street. For example, during the interrogation of a rabbi-chaplain, the following transpired:

INDIVIDUAL COUNSEL: . . . [T]he nature of the charge is based on words and I am just trying to find out if there is a norm of speech [*sic*] around here. R. Vol. 6, p. 2040.

LAW OFFICER: . . . But I am not particularly interested in any witness' idea of what is or is not disloyal. I will define that term to the court myself when I submit the case to them. That would be a mere personal opinion. I am sure both sides could present witnesses from many extremes to testify as to that.

INDIVIDUAL COUNSEL: That is one of the points we are trying to make.

LAW OFFICER: I will permit him to testify as to whether or not under the circumstances he thought the accused acted disloyal or whether his character is loyal or disloyal. I'll permit that as a character issue, but not as his ideas as to what is loyal or disloyal. That is hardly relevant.

Q. With respect to his character, is he loyal?

A. I believe he is.

Q. Now, what do you base that belief on?

PROSECUTION: Objection.

LAW OFFICER: Sustained. You are going in the same area.

INDIVIDUAL COUNSEL: I'm trying to go into an area—he has stated an ultimate conclusion. I want to find out the reason for his ultimate conclusion.

LAW OFFICER: You can do that—I'm permitting him to testify as to a character trait, loyalty, not as to what this wit-

(footnote continued on next page)

The administrative materials and the lack of judicial precedent underscore the deficiency here. It is the stat-

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ness might think an act may or may not be disloyal to the United States. *That is a very difficult abstract concept and if we are going to have testimony as to that we will be going through many, many hours of discussion and debate on that particular point.* A. 533. [Emphasis added.]

LAW OFFICER: You are asking strictly for a conclusion of this witness under what circumstances may or may not be disloyal or not disloyal to the United States. *I don't think you have any expert who can testify as to that.*

Q. May I ask you this question. You ever known of any enlisted man or any other officer or anyone else to your knowledge, that became disloyal because of Doctor Levy and his statements?

A. No.

Q. How about anyone who became disaffectionate?

A. No. A. 534. [Emphasis added.]

At another stage of the trial, a physician-witness was on the stand. The following occurred:

Q. He never made you disloyal, did he?

A. No, sir.

Q. He never made you disaffect, did he?

A. What does disaffect mean?

Q. I don't know.

LAW OFFICER: Mr. Morgan, if you don't know the questions, don't ask them.

.....
INDIVIDUAL COUNSEL: Could I have a meaning from the court what disaffection is?

LAW OFFICER: Should have asked it before you asked the question.

INDIVIDUAL COUNSEL: I asked for a ruling on disloyalty the other day and you said you would supply it before the case went to the jury. I am trying to make out a case of proof on disloyalty and disaffection. I have difficulty understanding what the words mean.

LAW OFFICER: Well, if you are going to ask the question you had better get the definitions before you go any further.
R. Vol. 7, pp. 2183-84.

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ute (with elucidating judicial construction) not the "specification of details of the offense" after its com-

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Then after a continuing colloquy in which an out-of-court hearing was requested, the following occurred:

INDIVIDUAL COUNSEL: I understand, Colonel. I am trying to get from you now, a ruling as to the legal definition of disaffection.

LAW OFFICER: And I am going to tell you now that you don't need it at this time. *All you have to do is ask this witness what he means by the use of that word.*

Q. What do you mean by the use of that word?

A. I never used it.

Q. Did you say you never —

A. Never used the word. I'm sorry.

Q. Fine.

LAW OFFICER: Then you will have to rephrase your question to approach something what you mean by it. R. Vol. 7, p. 2184. [Emphasis added.]

INDIVIDUAL COUNSEL: "... If I don't know the definition I don't know how to proceed.

LAW OFFICER: Certainly, there is a legal definition of those terms, but we do not expect the witnesses to know these legal definitions or to speak only in legal terms. . . . They are to describe certain acts or feelings or ideas that they themselves have as a factual content of meaning and certainly . . . you could reach that through questioning . . . without going through a legal definition. R. Vol. 7, p. 2185.

Then the law officer himself asked:

Q. Doctor, you were asked some questions which apparently Mr. Morgan found some confusion on. He used the word disaffection. I am going to ask you that in your conversations or contact with Doctor Levy, did he create in you feelings of hostility toward authority or a feeling that you should disobey or turn away from authority in the hospital there?

A. No, sir. R. Vol. 7, p. 2187.

And he then held an out-of-court hearing in which he defined both "disloyalty," and "disaffection," using such words as "unfaithful," "disgust" or "discontent," "ill will" and with respect to "disaffection," the word "disloyalty." Other words used were

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mission which gives fair warning to the individual.

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"respect," "obedience," and "allegiance." He stated, "... in this case as a general rule, as a general idea, I will give you a definition because I am going to have both counsel supply me with definitions." And: "Now here again, that is just a broad general statement, and I may not define those terms for the court in those terms because *I am not satisfied with them myself.*" R. Vol. 7, p. 2191. [Emphasis added.]

Then:

INDIVIDUAL COUNSEL: I don't mean . . .

LAW OFFICER: I cannot tolerate in any courtroom a lawyer posing questions where he is confused by the words. *Id.* [Ellipsis in original.]

Thus, the following had occurred:

A rabbi had determined that Dr. Levy was "loyal," an "ultimate conclusion," "a very difficult abstract concept," but was not allowed to testify as to what he meant by "loyal." But then the rabbi was not allowed to testify as to "a conclusion . . . under what circumstances may or may not be disloyal . . ." but was allowed to testify that he knew of no one made "disloyal" or "disaffectionate" because of Dr. Levy and his statements. Thus, a rabbi did and yet somehow did not define Dr. Levy's crime.

A physician witness was asked, at the suggestion of the law officer himself, what he meant "by the use of that word." He, the witness, "never used it" so counsel for Dr. Levy was invited by the law officer to define it as something "you mean by it." Then the law officer, an Army Colonel, defined the words but was "not satisfied with" his own definition.

Later the question of whether the statements made "were disloyal" was left up to a court-martial of ten Army officers ranging in rank from Major to Colonel.

Thus, among others, a rabbi, a physician, ten court members, the law officer, the convening authority, a hospital commandant, a Staff Judge Advocate, prosecuting attorneys, and compilers of a G-2 Dossier all were allowed a word or so in defining Dr. Levy's alleged crimes. Even Dr. Levy's attorney was invited to participate.

Compare Carroll, ALICE'S ADVENTURES IN WONDERLAND, AND THROUGH THE LOOKING GLASS (Airmont Pub. Co. ed. 1965):

"There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you

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Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

Another factor indicating the deficiency of the *Manual* is that it is open-ended in its Article 134 examples. J.S.A. 37a. It does not purport to list all offenses. Cf. *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973). Its examples are ever expanding in number.⁴⁹ The court of appeals considered these "at best . . . a compilation of those offenses previously determined by various court-martials to come within the breadth of Article 134." J.S.A. 38a. Aside from the lack of a unifying theme of the specifications, the court of appeals believed that the *Manual* "runs on collision course" with *United States v. Reese*, 92 U.S. 214, 221 (1876), where it was said:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. *Quoted at J.S.A. 39a.*

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don't—till I tell you. I meant 'theres a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice was too much puzzled to say anything. . . . *Id.* at 198.

* The *Frantz* court found forty-seven in 1953; there were fifty-eight in 1967, *Levy v. Corcoran*, 389 F.2d 929, 933-34 (D.C. Cir. 1967); the 1968 *Manual* listed sixty-three, J.S.A. 38a; the 1969 *Manual* lists seventy-three.

The "collision course" terminology fails to describe the error here, for the *administrative* branch is the decider and the military courts fail to draw the line. Thus any act may be prosecutable if the circumstances are correct. The net has no bounds.

The court of appeals, which found the Articles constitutionally deficient in three respects—(a) denial of due process because of lack of warning to the accused; (b) encouragement of arbitrary and discriminatory enforcement; (c) infringement of first amendment rights—was clearly correct.

B. There is No Compelling Need to Permit Special Exceptions Based on the Military Justice Code.

The court of appeals considered three suggested possible justifications for the General Articles: (1) maintaining high standards of conduct; (2) ease of conviction; (3) justifying punishment for servicemen who commit unforeseen crimes.⁵⁰ The court was not persuaded.

1. *Maintaining high standards of conduct.* Relying on *NAACP v. Button*, 371 U.S. 415, 438-39 (1963), it concluded that purposes of insuring high professional standards do not serve to rebut vagueness and overbreadth defects, and questioned

what high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one's duty, and secondly, executing it? J.S.A. 49a.

⁵⁰ J.S.A. 48a, citing Note, *Taps for the Real Catch-22*, 81 YALE L. J. 1518, 1534 (1972).

The court suggested that delineation of standards under Article 134 would serve to support the high standards, not the opposite.

The justification of the General Articles on the ground that they help maintain "high standards" relies on the chilling effect of vaguely defined offenses. The intended result is for individuals to steer wide of the impermissible zone of conduct for fear of being caught in its net. The basic concept is abhorrent to our legal system. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Also, as previously discussed, *supra* at 73-4, the "higher code" theory is a myth.⁵¹ But even if not a myth, the Congress has not declared a need for a military "higher code termed honor." Yet the appellants improperly call for its sanction here to the detriment of military personnel.

2. "*Ease of conviction.*" The court of appeals found this justification "totally bereft of explicit support," J.S.A. 49a, and the Government apparently abandons it in this Court.

3. *Justifying punishment for unforeseen crimes.* This justification fairly shrieks of its own invalidity. The claim seeks to justify *ex post facto* law. The court of

⁵¹ The Government argues that officers command men whose mission is to fight wars and have responsibility to commit men to combat. It concludes that, "[b]ecause officers may carry great responsibilities, the military has historically required an especially high standard of conduct for them." Brief for Appellants at 28. Platitudes do not answer constitutional questions. Many persons make decisions affecting life and death—physicians often, but also airplane manufacturers, bridge construction workers, etc. This alone hardly justifies an infringement upon their constitutional rights. There is no evidence that any higher standard of conduct for officers was imposed because of their responsibility rather than the fact that officers were selected, in times past, from the upper class, whose members, naturally, were "gentlemen."

appeals noted that there is no federal common law of crimes and cited *Task Force on the Administration of Military Justice in the Armed Forces*, Vol. 1, p. 96 (1972) for the lack of need for Article 134, J.S.A. 50a. The lack of need is underscored by the existence of other punitive articles, Articles 77 through 132, UCMJ, 10 U.S.C. §§ 877-932, which spell out offenses with far more clarity. Also, Article 92 permits the military to prosecute violations of any "lawful general order or regulation." Thus by promulgating orders or regulations the military seems provided with a capacity for near immediate response in effecting criminal sanctions.

It is questionable, of course, as to how real the Government's stated concerns are.⁵²

The Government's argument covers both sides of the coin: (a) the customs of the military are known to the military; (b) the instances in which an officer must make a decision "are too protean to be encapsulated in an exclusive listing." Brief for Appellants at 36. Indeed, the latter argument illustrates a misconception of what criminal statutes cover. Criminal statutes are not a list of all the possible ways in which one may commit, for example, assault and battery, but a criminal statute (as authoritatively construed) must define assault and battery. The fact that military duties are "protean" is exactly the difficulty. This justification completely negates the argument that military personnel know what their duties are simply because they are in the military.

⁵² "[T]he military is well known for its ability to promulgate detailed regulations on many subjects much less important than the First Amendment." *Stolte v. Laird*, 353 F. Supp. 1392, 1399, n. 26 (D.D.C. 1972).

The former Judge Advocate General of the Army, Major General Kenneth J. Hodson, now Chief Judge of the Army Court of Military Review, has expressed the view that Article 134 offenses could be delineated elsewhere and promulgated with specificity. "We would thus rid ourselves of 'the Devil's Article.' We don't really need it, and we can't defend our use of it in this modern world." Hodson, *Perspective: The Manual for Courts-Martial—1984*, 57 MILITARY LAW REV. 1, 12 (Summer, 1972).

C. The Utilization of the General Article Clearly Indicates That It Is Not Needed.

Mindful that first amendment incursions must be limited to the maximum extent possible, an examination of the "military necessity" for the General Articles reveals their overbroad utilization. An illuminating analysis of the use to which Article 134 is put is found in Moyer, JUSTICE AND THE MILITARY (Public Law Education Institute: Washington, D. C. 1972). The author found actual uses of the Article as follows:

- A) Conduct punishable under another article of the UCMJ. When article 134 is used to try conduct punishable under another article, it may be for one of the following reasons:
 - 1) fear that available proof may be insufficient and that prosecution under a specific article would result in a failure of proof;
 - 2) to obtain a higher punishment than the permissible maximum for an offense under a specific article;
 - 3) to duplicate a charge under a specific article: redundant pleading;

- 4) because of ease of charging under 134: lazy or sloppy pleadings.
- B) Conduct not covered by another article of the UCMJ. When this is the case, the charge may reach two broad categories of conduct:
- 1) conduct that is proscribed in most criminal law systems but is not specifically codified under the UCMJ; *e.g.*, bribery, adultery, criminal libel, indecent assault, perjury, unlawful entry, carrying a concealed weapon, drug offenses, and others;
 - 2) conduct that is not punishable under a specific article and does not customarily constitute criminal conduct; *e.g.*, sexual conduct, violations of traditional separation between officers and enlisted men, and other miscellaneous acts deemed reprehensible.
- Id.* pp. 1018-19.

The Article is used to charge an offense when the evidence will not support a conviction for another specific offense. An element of the other offense may have been eliminated but a conviction is had because of the prejudice to good order and discipline.

By charging under Article 134 the punishment may be increased since the maximum punishments established for Article 134 by the executive under Article 56, UCMJ, 10 U.S.C. §856, may exceed those established by the executive for a specific statute.

Efforts to increase the numbers of offenses so that the charges are multiplicitous or redundant are easily facilitated by the General Article. Moreover, Article 134 may be used as a lesser included offense *under Article 133. United States v. Lee*, 4 C.M.R. 185 (ABR), *petition for review denied*, 4 C.M.R. 173 (1952).

Often a charge is lodged under Article 134 which clearly could have been charged under another punitive article of the UCMJ. Moyer considers this "lazy or sloppy pleading." Clearly this use, whether done through lack of professional performance or by simple choice, will hardly help in justifying the Article's existence. The Article's use to charge common criminal offenses (adding to them the easy gloss of "prejudicial to the good order") is an insufficient justification for its sweeping nature and chilling effect on constitutionally protected speech. The other uses here are even less needed, much less compelling—prosecution for "immoral" conduct (sexual conduct), enforcement of officer/enlisted man dichotomy, deterrence of possibly reprehensible acts not generally considered criminal (minors drinking in public places).

The Record here, if not a model of how to abuse the General Articles, is an excellent illustration. Additional Charges II (Article 133) and III (Article 134) were based on the writing of a single letter. Charge II (Article 134) and Additional Charge I (Article 133) were based on the same words, and are concededly multiplicitous. Lesser included offenses, based on manslaughter-type negligence, were charged under Charge II, and additional Charges II and III. A. 628, 634, 636.⁵³

The prosecution conceded the letter charges were multiplicitous for punishment purposes. But they did place Dr. Levy's political views before the career officer court.

⁵³ The charge to the court-martial was "culpable disregard for the foreseeable consequences." The law officer equated this with "gross negligence." A. 638-39, 642. And when the court-martial found "culpable negligence" instead of "culpable disregard" or "gross negligence," A. 645, the last two charges were dismissed. A. 646.

IX. THE STATUTES SHOULD BE HELD VOID ON THEIR FACE TO PREVENT VIOLATION OF THE FIRST AND FIFTH AMENDMENTS. ADDITIONALLY, THE VOID FOR VAGUENESS DOCTRINE IS NECESSARILY APPLICABLE BECAUSE OF THE LIMITED REVIEW OF MILITARY PROSECUTIONS.

The Government contends that the General Articles should not be reviewed for facial invalidity, citing two lines of authority. The first is that under *United States v. National Dairy Corp.*, 372 U.S. 29 (1963), statutes may not be invalidated merely because "marginal offenses" present difficult questions. But *most* military prosecutions under the General Articles present difficult questions, because of the statute's extraordinary vagueness and overbreadth.

The second contention is that statutes are held facially void only where they regulate "spoken words" and not where they properly regulate a class of conduct. Reliance is placed on *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548, 580-81 (1973), where this Court said it would not invalidate a statute on its face because the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . ." And in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), where this Court said "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The Government's reliance is misplaced.

First, it argues that the overbreadth here is not substantial since the *Manual* lists some seventy offenses

for Article 134, only five of which relate to speech. This "count" is not an appropriate measure of "substantial overbreadth." A statute which reads "all crimes against society shall be punished" may well encompass constitutionally proscribable offenses—but they are not easily discernible and the statute is both vague and overbroad.

Second, Dr. Levy was convicted of speech—not conduct.

Third, unlike *Letter Carriers*, the speech for which Dr. Levy was convicted is not plainly covered by the statutes involved.

Fourth, as contrasted with *Letter Carriers*, the General Articles have hardly been "fleshed out" by "repeated adjudications . . . subject to sufficiently clear and summary statement." 413 U.S. at 572. The military courts have seldom if ever held that any offense contained in a specification could not be covered by the Articles. The military appellate courts often hold an offense not proved or rule that certain conduct is *not* an offense *under the circumstances*—but they rarely hold that a particular act *could not* be punishable. The military's General Article criminal offenses are but an *ad hoc* collection, and almost any conceivable act, if done under the appropriate circumstances, can be prosecuted. Compare, *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), condemning intricate regulations which cause people to steer far wider of the unlawful zone than required. And here the law officer's charge on proscribed speech is a more than adequate example of why military personnel should fear speaking on any slightly controversial subject when the Army is not likely to agree with their views.

Fifth, the Government contends, as noted in *Broadrick*, that the courts may refuse to consider claims of facial overbreadth against a statute if it is not a "censorial statute, directed at particular groups or viewpoints," citing *Keyishian*. 413 U.S. at 616. But *Keyishian* was aimed at exactly the only kind of speech the Army prosecutes.

And Dr. Levy's case involves pure speech. Cf. *Plummer v. City of Columbus*, ___ U.S. ___, 94 S.Ct. 17 (1973); *Norwell v. City of Cincinnati*, ___ U.S. ___, 94 S.Ct. 187 (1973).

First and fifth amendment rights demand protection even for their periphery. *Keyishian v. Board of Regents, supra*; *Winters v. New York*, 333 U.S. 507 (1948). Dr. Levy presents an issue where not only is the statute vague as to the acts it seeks to proscribe, *Connolly v. General Construction Co.*, 269 U.S. 385 (1926), but it also regulates protected speech, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Herndon v. Lowry*, 301 U.S. 242 (1937), and encourages arbitrary and erratic enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). Dr. Levy is challenging the statute squarely on its deficiencies, and does not rely on others' rights. Cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *NAACP v. Alabama*, 357 U.S. 449 (1958). While this Court does not lack the authority to construe federal statutes, cf., *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971), "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). Under both *Letter Carriers* and *Broad-*

rick, this case is appropriate for deciding the facial validity of the Articles.

A singularly important factor in deciding the "matter of no little difficulty"—whether or not a statute is to be held void on its face, *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971)—is suggested by Amsterdam in *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960):

These considerations [*e.g.*, buffer zone protection and judicial reluctance to determine the criminal law on a case-by-case basis] will suggest that the void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the *institution* of federal protection of the individual's private interests. The doctrine determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation *sub silentio* of the rights of particular citizens and, second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights. [Emphasis in original.]

Thus whom the statute is to be applied by should be considered. This Court's review is more readily accessible, and constitutional infractions more easily prevented or corrected, when adjudications are not shielded by intermediate, non-federal appellate steps such as state habeas. Military adjudications are at least three more steps removed from this Court than ordinary state and federal cases since direct appeal may not be taken from the Court of Military Appeals.

Here, where censorial powers are applied by the military, judgments are made by courts-martial "singularly inept" in applying the Bill of Rights, and review of military convictions by Article III courts is exceedingly limited, the most efficient manner of protecting individual rights is by facial consideration of the Articles.

X. DR. LEVY'S PROSECUTION WAS SELECTIVE AND INVOLVED THE UNEQUAL APPLICATION OF MILITARY LAW. THE CONVICTION ON EACH CHARGE VIOLATED THE FIRST AND FIFTH AMENDMENTS.

The basis for Dr. Levy's conviction was disagreement with Army policy concerning the Vietnamese war. Since the right to disagree and say so is guaranteed by the first amendment, the exercise of that right cannot be a "rational basis" for a criminal prosecution. And the actions of the Army are doubly prohibited in that it is only a particular kind of speech, free and not Army speech, that is rendered criminal.⁵⁴

Dr. Levy also tried to show the district court that he was treated unequally with other physicians at Fort Jackson.

He filed an affidavit in the district court, Exhibit C to Petition for Writ of Habeas Corpus, pp. 138-40, which indicated that another doctor at Fort Jackson who expressed no strong opposition to the war in Viet Nam requested that he not be sent Special Forces personnel for training because of medical ethics and belief the program was absurd. His request was granted and he was sent no more of them.

⁵⁴ Cf. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-510 (1969).

The difference between the two physicians is apparent. Dr. Levy exercised constitutionally guaranteed rights in the then mutually unpopular local causes of being pro-Negro and anti-war. His fellow physician had no interest in exercising these rights or adopting those positions and he remains free.

Doctor Levy discussed these questions in what he thought was the privacy of his office, as any professional or other person might do. But he did not "broadcast" as the Government contends. Brief for Appellants at 46. He talked because that is the nature of his freedom. He discussed medicine and medical ethics, R. Vol. 7, p. 2347, books he had read on civil rights and Vietnam, *id.*, p. 2348, theater, history, and democracy, *id.*, p. 2346. A Special Forces Aidman to whom the strongest statements were allegedly made, also signed the statement that

Levy did not try to pressure me into changing my opinions. A. 729.

And in training Special Forces Aidmen, who have a higher G.T. score (similar to I.Q.) than Officers' Candidate School graduates, R. Vol. 6, pp. 2022-23, dissent is not discouraged. R. Vol. 6, p. 2133.

The Government protests too loudly the danger it seeks to suppress. "It is a disservice to our military personnel to presume that they would be so easily swayed" *Stolte v. Laird*, 353 F. Supp. 1392, 1404 (D. D.C. 1972). The fear that Dr. Levy's speech should be punished for its potential to create "within the military itself a cohesive force for the purpose of compelling political decisions" which would undermine "civil control of the military," *Dash v. Commanding General*, 307 F. Supp. 849, 856 (D. S.C. 1969), *aff'd*, 429 F.2d 427

(4th Cir. 1970) (cited in Brief for Appellants at 46) decries too much. The fear stated is that "the political decision to involve this nation in such war might be influenced, if not reversed." 307 F. Supp. at 856-57. But, as *Dash* said, the Government is not concerned with military speech that supports its current policies.

Its fear is really that its policy will be "influenced, if not reversed." Military speech in favor of a current policy or of more aggressive military action was not prosecuted. Our Commanders-in-Chief and Secretaries of Defense and State long stated that a peaceful negotiated settlement in Vietnam was preferable to total military victory. But sundry generals disagreed.

Indeed the defense establishment is in the business of "educating" the public. Shoup, "The New American Militarism," *The Atlantic* (April 1969); Cook, *THE WARFARE STATE*, ch. 4, "Madison Avenue in Uniform," (1962); Mollenhoff, *THE PENTAGON* (1967). Roy I. Wood, Jr., Colonel, assigned to the 6th Marine Corps stationed at Atlanta, Georgia, testified as to the practice of sending officers and Vietnam veterans to speak to civilian groups. These personnel spoke in uniform, during and after duty hours. R. Vol. 6, p. 2114. They supported our troops, *id.* at 2115, and Colonel Wood had never heard of an instance of his speakers being against the war in Vietnam. *Id.* If he heard of such an instance he assumed that he "would take some action, but I don't know exactly what action." *Id.* at 2116. And it was "conceivable" that he would take less action against a speaker who might say, "I think we ought to bomb Peking, go on to China." *Id.* and *id.* at 2117. And the law officer said:

Well, now, let's see if we can make this relevant here to these proceedings. Other people speak for

the Army before service clubs and so on.
R. Vol. 6, p. 2110.

Well, I've talked, too, many times before, and they haven't court-martialed me. I wonder how we tie it into the specifics of the case?
R. Vol. 6, p. 2111.

The fact that the Army prosecuted only those who expressed themselves at variance with the military's policy in Vietnam is precisely the point.⁵⁵

The folly of attempts to compel uniformity of thought, aside from their unconstitutionality when sought by government, has been described by Mr. Justice Jackson for the Court, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943):

Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . Authority here is to be controlled by public opinion, not public opinion by authority.

⁵⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886):

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court

XI. THE GOVERNMENTAL FAILURE TO PROVIDE DR. LEVY WITH THE TRAINING REQUIRED AND PROVIDED OTHER OFFICER-PHYSICIANS VOIDS HIS PROSECUTION. IT DENIED HIM THE OPPORTUNITY TO GAIN KNOWLEDGE OF THE CUSTOMS OF THE SERVICE.

The Government asserts that since "AR 350-212 (4) requires the officers under a training course in military justice which gives them a thorough exposure to the *Manual* [sic]." Brief for Appellants at 41-42. If this is an attempt to impute knowledge it fails by Record refutation.

The Army established a training course at Fort Sam Houston for physicians. But Dr. Levy spent his entire tour of duty at Fort Jackson.

Col. Coppedge: The physician who comes into the service has no role—has had no prior military experience, and in the month or so training which he gets at Fort Sam Houston is designed to prepare him for military duty to give him some idea about the organization of the service, to teach him how to wear the uniform, and to perform the military courtesies in an acceptable manner, to be at ease in the service, and to really perhaps get some idea about what the Army is all about.

R. Vol. 6, p. 2127.

Colonel Fancy had heard of some problem with Dr. Levy not joining the Officers' Club and that "*he found it difficult to comply with certain customs of the service, such as proper wear of the uniform and trimming of hair and such general things.*" A. 384. [Emphasis added.]

According to LTC Edwin T. Cooke, Director of Neuropsychiatry, Medical Field Service School, Fort Sam Houston, Texas, the basic medical officer orientation

course "has been as brief as two weeks and as long as six weeks. The current course is four weeks and some days." R. Vol. 5, p. 913. The purpose of the course is "the orientation of the physician that comes into the military service, primarily to orient to the requirements for medical practice within the military service, within the military situation." R. Vol. 5, p. 915. Colonel Richard L. Coppedge, a former instructor at the Medical Field Service School, felt that doctors have special problems in being assimilated into the military.

Furthermore, in their training, medical people physicians, are certainly taught to differ from their instructors or their superiors on any point. If you feel a patient should be treated one way and the professor feels he ought to be treated another way, it is your patient, and really he's got to justify to you in effect, with the treatment he thinks is better. Well, in other words, it's not so much that it appeals to authority on this, but an appeal to reason. This can't be entirely discarded like that just because you put on a uniform. . . .

R. Vol. 9, p. 2625.

Thus,

the officer that gets this training has been able to get into his duties, military duties, more effectively and more efficiently, earlier in his Army career. I think the person who doesn't get this training is at a disadvantage. R. Vol. 9, p. 2623.

And in September, 1965, Colonel Coppedge failed to make a trip to Fort Jackson to explain the training program to the physicians. R. Vol. 6, p. 2131. He finally made that trip in May, 1966. R. Vol. 6, p. 2145. He testified,

Certainly it is important that [the Special Forces Aidman] gets this training, but the training itself

cannot be fully effective unless the people who conduct the training understand what the training is expected to accomplish. . . . *Id.*

The Army's total failure to provide training to Dr. Levy—its *own* failure to abide by its *own* regulation, AR 350-212 (4), which requires a "thorough exposure to the *Manual*"—results in an argument by the Government which is totally inapplicable to the facts of the case. Except for a few Saturday morning training sessions Dr. Levy had no training which provided notice or knowledge of military law or customs. See Statement, *infra*, pp. 9-11.

XII. THE FAILURE TO DISCLOSE EVIDENCE DENIED DR. LEVY A FAIR TRIAL.

A. The Failure to Disclose the Entire G-2 Dossier to The Defense Was a Violation of the First, Fourth, Fifth and Sixth Amendments.

Colonel Henry Fancy ordered Dr. Levy to train Special Forces Aidmen. According to Colonel Fancy, Dr. Levy replied:

he did not feel that he could ethically conduct this training because it was against his principles, or words to that effect at least. . . . A. 377.

Colonel Fancy decided that Dr. Levy's failure to instruct aidmen warranted an Article 15 non-judicial punishment.

Colonel Fancy was then called to the Judge Advocate General's office where he ". . . reviewed the G-2 dossier . . ." and ". . . felt that the wrongdoing was of a greater nature than should be punished by an Article 15

and it was my feeling at that time that a court-martial was indicated."⁵⁶ A. 396.

What magic did the dossier contain to transform these proceedings from the potential wrist-slap punishment of an Article 15 non-judicial proceeding to a full scale trial by court-martial, an eleven-year prison potential, discharge from the service, a wrecked professional career, and an actual sentence to three years at hard labor? *Neither the accused nor his counsel was allowed to find out.*⁵⁷

The prosecutor reviewed the entire dossier, R. Vol. 3, p. 86, the law officer reviewed it *in camera* after, in effect, obtaining prosecutorial permission, *id.*, and assistant military defense counsel was allowed to review it. Everyone saw the dossier but the two men most in need of it—the defendant and his chief counsel.

* Q: But, you didn't decide to move forward until you read the G-2 dossier again, right? On the Court-martial?

A: Yes, sir.

Q: Consequently the elevation of the Charge I from the Article 15 to Article 90 violation was based on reading the G-2 dossier wasn't it?

A: *In large part, yes, sir.* A. 397-98. [Emphasis added.]

* But there are some suggestions in Colonel Fancy's testimony:

Q: . . . According to testimony received here yesterday, which was made by Colonel Davis, and I quote exactly. You entered and you said that, "His records are flagged." And, then, your quote was, "Pinko." What do you mean by the word "Pinko."

A: This is a slang term that refers to someone who tends to follow communist beliefs, in an off-hand definition.

Q: Fine, so, you have knowledge of at least some facts at the time that you told Colonel Davis that Levy's file was flagged, "Pinko," right?

A: I had knowledge of something. A. 1085.

And: I obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents. A. 423 (h).

Refusing to allow civilian counsel to examine the entire dossier, even though appointed military defense counsel (chosen not by the defendant but by the Government) viewed the dossier, denied Dr. Levy effective assistance of counsel. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Pyle v. State of Kansas*, 317 U.S. 213 (1942).

"[D]efense lawyers are not to be regarded as window dressing in the criminal process." *Molignaro v. Smith*, 408 F.2d 795, 799 (5th Cir. 1969). This is particularly true of a civilian lawyer who is chosen by a serviceman to act in his defense before a military tribunal.

Permitting the Army as prosecutor to appoint defense counsel—and then, as prosecutor, to reveal only to that military counsel the evidentiary documents upon which the charging officer, Colonel Fancy, testified that Dr. Levy's prosecution was based—reduces the role of civilian counsel. The argument at the court martial—that different lawyers look at different things different ways, that the two people who knew the most about the defense were Dr. Levy and his civilian counsel, and that some lawyers are more experienced than others—was to no avail.

There are two arguments supporting the Government's refusal: (1) security matters were involved and civilian counsel should not be allowed to see the dossier; and (2) the defense is not entitled to the Government's case. The first point is without merit. The dossier contains matters with a security status no higher than "confidential." Exh. C to the Petition for Writ of Habeas Corpus, p. 50. Dr. Levy's chief defense counsel could probably have secured a security clearance at the time of the court-martial and suggested that

solution. He was provided clearance to view the entirety of the transcript in a later case arising in Vietnam involving allegations of murder by a Special Forces officer, portions of which were classified "top secret." *Id.* at 121-22.

By permitting military defense counsel to examine the dossier, the Government waived any objection that the defense was not entitled to the Government's case. The Government's decision in this respect is extremely strange. It let one lawyer review the dossier and not the others. Since it did this for other than security reasons, the only likely reason is that it sought to protect the Record so that it could later make the argument that the defense had this information. But allowing the Government to select which counsel shall view the evidence is a concept new to criminal defense.⁵⁸

Dr. Levy was entitled to the *adequate* assistance of civilian counsel, yet his chosen lawyer was not allowed to see most of the very dossier which was the basis of the charges and their upgrading. It having been alleged by the defense that the charges were based in part on Dr. Levy's pre-service activity, *cf. Harmon v. Brucker*, 355 U.S. 579 (1958), and his racial and political views, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967), the refusal to permit civilian defense counsel to view the

⁵⁸ Even if the disclosure to the military defense counsel could be construed to give sufficient information to civilian counsel, the Record does not support this. Military defense counsel was not allowed to reveal what he had seen. He requested certain items but was told he could not get others so he did not request them. A. 351. The prosecution agreed that military defense counsel was bound by Army Regulations to non-disclosure. Military counsel "could not reveal it to [civilian defense counsel] anymore than he could go look at it himself." *Id.*

dossier violated Dr. Levy's first, fourth, fifth and sixth amendment rights.

The dossier may have contained illegally obtained matter. This should have been disclosed. *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 302 U.S. 379 (1937) and 308 U.S. 338 (1939). If it contained evidence favorable to the accused, concealment was improper whether done in good or bad faith. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Griffin v. United States*, 336 U.S. 704 (1949), *on remand*, 183 F.2d 990 (D.C. Cir. 1950).

B. The Failure to Require the Disclosure of Questionnaires Prepared by the Government Deprived Dr. Levy of a Fair Hearing.

The Government submitted questionnaires to approximately 450 persons, the names coming ostensibly from Dr. Levy's patient records. Of these 450 persons, 13 were called as witnesses, and the questionnaires of these 13 were turned over to the defense. Since the Government contended that Dr. Levy made statements to "divers" persons with a "design" in a "public" manner, the defense asked for the balance of the questionnaires to show that the Army could not find more than 13 people who heard such statements, and possibly to disprove the testimony of the 13 called as witnesses. The contents of these other questionnaires were totally unknown to the defense.

The Army refusal was based on the Jencks Act, 18 U.S.C. §3500. That Act, however, requires only that the statements of witnesses be provided to the defense. Chief defense counsel for Dr. Levy specifically rejected

the Jencks Act as the grounds for production of the documents, relying instead on constitutional guarantees, complying with the mandate of *United States v. Augenblick*, 393 U.S. 348 (1969). Compliance with the Jencks Act does not rid the Government of its duty not to withhold information helpful to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935); and *Pyle v. State of Kansas*, 317 U.S. 213 (1942).

It is no defense of the Government's refusal to say that Dr. Levy had access to the same witnesses, since they had been his patients. Compelling the defendant to contact 437 persons at his own expense was patently unfair, since the Government was not going to use the questionnaires and the information would have aided the defense.

The Government's facilities for discovering evidence are usually far superior to the defendant's. This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. *Levin v. Clark*, 408 F.2d 1209, 1211 (D.C. Cir. 1967).⁵⁹ [Footnote omitted.]

* The reasoning which supports the right of a defendant to counsel at all critical stages of a criminal proceeding, cf. *United States v. Wade*, 388 U.S. 218 (1967), also supports the right of access to helpful evidence discovered by the prosecution.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. *United States v. Wade*, *supra*, 388 U.S. at 224. [Footnote omitted.]

Today, however, evidence is not largely marshalled at the trial, where it is available to all, but is assembled prior to the confrontation. To deny the defense access to helpful prosecution evidence violates the Constitution.

When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. *Id.* at 1212, citing *Griffin v. United States*, 183 F.2d 990, 993 (D.C. Cir. 1950).

The district court refused to make the questionnaires available because it felt they could not negate the remarks made to the 13 prosecution witnesses.⁶⁰ But to constitute "evidence favorable to defendant," it has never been required that the evidence be clearly exonerating. It must only be favorable.

Withheld evidence violates due process. The court of appeals did not reach this issue but alone it is sufficient for reversal of the pure speech charges.

C. Appellee Was Entitled to the Disclosure of Information Obtained by Electronic Surveillance.

Dr. Levy moved under Rule 16 of the Federal Rules of Criminal Procedure for an order to permit counsel to inspect and copy all records, memoranda, and other writings, recordings or other electronic surveillance of Dr. Levy, his place of work or residence or any other place frequented by him.⁶¹ App. 47. He believed that such surveillance was carried on, but the practical problems of establishing this are foreclosed if the Government fails to disclose the fruits of the surveillance.

⁶⁰ The district court reasoned:

If petitioner did not make certain statements to others than the 13 witnesses produced at the court-martial, this certainly would not negate the fact that he made the statements to the 13 witnesses, or that the utterances were "public" and made to "divers" persons. It is not "evidence favorable to defendant." 316 F. Supp. at 476, App. 20.

⁶¹ No showing of relevance is necessary. *Alderman v. United States*, 394 U.S. 165 (1969).

The district court denied the motion on the Government counsel's representation that the Government obtained no information by eavesdropping. Counsel for Dr. Levy accepted this representation as given in good faith, but had reservations as to its accuracy due to the large number of people involved in the prosecution and the possibility that the sought information might not have come to the attention of this particular Government counsel. *Levy v. Parker*, 316 F. Supp. 473, 475 (M.D. Pa. 1970). J.S.A. 99a.

An order should be entered requiring a thorough search of the records of Defense Department, Fort Jackson, Military Intelligence and other appropriate military and civilian agencies including the Justice Department for evidence of any such surveillance. Additionally, all personnel who assisted in the prosecution or investigation of this case should be inquired of as to their knowledge, if any, of any such surveillance. And the involved agencies should be required to disclose their search efforts to this Court and to counsel for Dr. Levy.

XIII. THE ARTICLE 90 CHARGE SHOULD REMAIN REVERSED REGARDLESS OF THE DISPOSITION OF THE PURE SPEECH CHARGES.

The law officer refused to sever Charge I (the order charge) and the four pure speech charges, thereby depriving Dr. Levy of additional constitutional rights. See e.g., *Pointer v. United States*, 151 U.S. 396, 403 (1894); *Williams v. United States*, 168 U.S. 382 (1897). There can be no doubt that the joinder of the four pure speech charges crippled the defense:

1. Dr. Levy was effectively deprived of the right to

testify on his own behalf; had he taken the stand and testified about either the order charge or the pure speech charges or the two letter charges, he tacitly would have admitted guilt by his silence as to the other charge or charges. See the "anomalous situation" condemned in *Stump v. Bennett*, 398 F.2d 111, 120-21 (8th Cir.), cert. denied, 393 U.S. 1001 (1968), and cases there cited. See also *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964).

2. Had he risked the stand as to all charges or the pure speech charges or letter charges alone, his testimony regarding purely political matters and matters of national policy might have so infuriated his career-military judges that his sentence would have escalated to the five year maximum on the order charge.

3. His refusal to train Special Forces Aidmen was not demonstrative of a scheme or design. To the rational mind exactly the opposite is the case. Had he desired to make Special Forces "disloyal" or "disaffectionate" he would have maintained at least a speaking acquaintance with them. As it was he refused to train them and thereby put them totally beyond the range of his voice. The reason for joinder clearly and solely was to prejudice the career-officer court.

4. By joinder he was forced to a "grisly 'Hobson's Choice,'" and testified not at all. Cf. *Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964); *Stump v. Bennett*, *supra*.

5. There were other possible defenses to the order charge. For example, Dr. Levy might have pleaded that obedience to the order was impossible either due to the unwillingness of his patients to serve as observed

guinea pigs or the inability of the students to absorb the knowledge or their unwillingness to abide by his rules. And, most importantly, without the political content of the pure speech charges before them, the career-officer jury might have disbelieved the order charge evidence or, if they believed that evidence, sentenced him with leniency.

The Government argues that the joinder was not prejudicial. First, says the Brief for Appellants at 48, in military courts offenses must normally be joined which do not have the same or similar character.

And why "must" they be so joined—because the *Manual*, ¶¶ 30g, 33h (1969) says so. *Id.* See also MCM, ¶33h (1951). According to the Brief for Appellants at 51, separate trials on offenses arising out of separate transactions "is not the procedure Congress authorized, and there is no reason to impose such a requirement on the court-martial system." *See*, J.S.A. 16. As pointed out in the Motion to Dismiss or Affirm, p. 25, n. 29, Congress did not authorize this procedure—the President promulgated it. This procedure, in direct contradiction of Rule 8 (a), Federal Rules of Criminal Procedure, ignores 10 U.S.C. §836, which requires the President to prescribe

[t]he procedure, including modes of proof . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Severance here would not have been in any way inconsistent with the UCMJ and the Government made no claim that separate trials to accord with the federal

rule would not have been practicable. Instead, it argues "it is not done."

The four pure speech charges—no matter the desire of the court to remain impartial—must have offended and shocked at least some career-officer court members. Dr. Levy stood against their chosen profession, their way of life, and perhaps for some—their past actions.

The general rule concerning consolidation of charges was established in *Pointer v. United States*, 151 U.S. 396, 403 (1894), where it was recognized as fundamental . . . that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury. . . . [Joinder of felonies is not automatically fatal but the] court is invested with such discretion as enables it to do justice between the government and the accused.

Even where a statute controls joinder of related offenses, the power of the Court to rule on the propriety of joinder continues. *Williams v. United States*, 168 U.S. 382 (1897).

The four pure speech charges and the order charge did not involve the same witnesses or issues, a common plan or related offenses. Indeed no witness involved in the proof of Additional Charges II and III was in the remotest manner related to the proof of Charge II and Additional Charge I, let alone Charge I, the order charge. The prejudicial effect of the evidence offered under Additional Charges II and III—charges involving an eight-page letter in which Dr. Levy's political philosophy was bared to the career-officer Court members—is incalculable.

The Government has never contended that the letter charges were necessary.

LAW OFFICER: Additional II and Additional III the Government concedes are multiplicitious for punishment purposes at any rate?

PROSECUTION: Yes, sir.

LAW OFFICER: Fine.
R. Vol. 3, p. 117.

But when the court delivered its verdict on these two charges the prosecution moved their dismissal and the maximum punishment dropped in some mysterious fashion from eleven to eight years. A. 646. The letter charges had served as the genesis for the prosecutor's closing argument. R. Vol. 9, p. 2554. They had served to prejudice the career-officer court and were dropped when wrung dry of usefulness.

As previously noted, joining the order charge to the pure speech charges permitted the Government to prove basically inconsistent factual situations. The law officer stated plainly that "the evidence tending to show the disobedience of the order" was that Special Forces personnel were told by Dr. Levy "I'm not going to train you and the person went on his way. . . . There was no additional presentation to that individual of the statements concerning our involvement in Viet Nam as I understand it." A. 480. Yet the speech charge evidence was that the statements were made to "divers personnel" which included Special Forces and "everybody to whom the statements were made." *Id.* Allowing the Government to prove two conflicting fact theories—a refusal to train and be exposed to Special Forces personnel versus the desire to "subvert" them—to prove separate crimes in one trial was error. *Williams v. United*

States, supra; Pointer v. United States, supra. The Government correctly notes that the "substantially prejudiced" test dissenting Judge Seitz applied was formulated by him and contends that this departure from the law was justified because the differences between military and civilian trials render existing civilian court authorities irrelevant. Brief for Appellants at 49.

The court of appeals majority noted that the inflammatory evidence most calculated to disturb the court-martial members was introduced under the Articles 133 and 134 charges, and most of this "would have been inadmissible under the Article 90 charge" J.S.A., 54a. Thus they found "with some facility that Levy was prejudiced by the admission of evidence on the Articles 133 and 134 charges; in any event, there undoubtedly existed a reasonable possibility that he was prejudiced." *Id.* at 56a. They declined to speculate on the course of the trial if only the order charge had been tried.

Despite the test created by Judge Seitz,⁶¹ the majority applied the correct test. This Court no longer searches the record for actual prejudice. Rather, it looks first to see if the practice complained of is inherently prejudicial, and if so, the inquiry goes no further. In *Estes v. Texas*, 381 U.S. 532, 543 (1965), Mr. Justice

⁶¹ See, Wright, FEDERAL PRACTICE AND PROCEDURE: Criminal Vol. 1, §141, p. 306, commenting on joinder:

It is novel doctrine that the right of an accused to a fair trial can be balanced against competing considerations of efficiency. . . . It seems strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not "substantial," merely to serve the convenience of the prosecution.

Clark expressly said that the Court had rejected the actual prejudice test:

In [*Rideau v. Louisiana*, 373 U.S. 723 (1963) and *Turner v. Louisiana*, 379 U.S. 466 (1965)], the Court departed from the approach it charted in *Stroble v. California*, 343 U.S. 181 (1952), and in *Irvin v. Dowd*, 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.

Regardless of speculation as to the outcome of a separate trial on the order charge, there is one certainty—Dr. Levy's eight-page letter would not have been placed before the career-officer court nor would its contents have been relied upon. Actual evidence of how Dr. Levy's political or racial views affected at least one career officer is available. For Colonel Fancy had thought the order charge merited Article 15 "dereliction of duty"—non-judicial punishment—treatment until he read of Dr. Levy's views and whatever else was contained in the G-2 Dossier.

He upgraded to a general court-martial. Whether because of bias or confusion, *Kotteakos v. United States*, 328 U.S. 750, 767 (1946); *Williams v. United States*, 131 F.2d 21, 23 (D.C. Cir. 1942) ("[W]hat value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"), Dr. Levy was prejudiced in his defense to the order charge.

Not only is there a "substantial possibility that [the] error may have infected the verdict," *Wardius v. Oregon*, 412 U.S. 470, 479 (1973), but "there is present in

this record abundant evidence of actual prejudice." *Dickey v. Florida*, 398 U.S. 30, 38 (1970). Consequently, the reversal of the order charge conviction was correct regardless of whether or not the pure speech charges convictions were proper.

XIV. THE MILITARY FORUM IN WHICH DR. LEVY WAS TRIED WAS CONSTITUTIONALLY DEFECTIVE.

A. The following groups were excluded from Dr. Levy's court-martial panel:

- (1) Non-career personnel.⁶²
- (2) Enlisted men.⁶²
- (3) Officers equal to or lower in rank than Dr. Levy.⁶²
- (4) Medical personnel.⁶³
- (5) Women.⁶⁴

Timely motions were made to quash the court-martial panel on the grounds of exclusion of each of these groups, which motions were denied. R. Vol. 3, pp. 36-38, 208.

While this Court has assumed in dicta that the sixth amendment right to trial by jury does not apply in the

⁶² Article 25 (d) (1), UCMJ provides: "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."

⁶³ AR 40-1, ¶ 9-B provides in part: "Except when regulations specifically stipulate to the contrary, such officers [members of the medical corps] will not be detailed as members of courts-martial. . . ."

⁶⁴ There were no women summoned for service on Dr. Levy's court-martial. He offered to prove in addition that during the preceding fifteen years no woman had ever been a member of a general court-martial at Fort Jackson. R. Vol. 3, pp. 138-45, 208, 213-14.

military, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Quirin*, 317 U.S. 1 (1942); *O'Callahan v. Parker*, 395 U.S. 258 (1969), it has consistently held military courts to minimum constitutional standards. *Burns v. Wilson*, 346 U.S. 137, 142 (1953):

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from violation of his constitutional rights.

Since *Strauder v. West Virginia*, 100 U.S. 303 (1880), the sixth amendment "impartial jury" requirement has applied to trials in most American courts. The prosecution conceded as much, R. Vol. 3, p. 165, and decisions of the Court of Military Appeals so provide.

Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge. *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 6 (1964).

But the effect of Article 25 (d) (1) was to exclude from consideration for service on Dr. Levy's court enlisted men, non-career personnel and officers equal to or lower than he in rank. As for exclusion of women, Dr. Levy clearly established a *prima facie* case and it was error for the law officer to deny summarily the motion to quash. *Whitus v. Georgia*, 385 U.S. 545 (1967); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court); *Healy v. Edwards*, 363 F. Supp. 1110 (E.D. La. 1973) (three-judge court) (regarding exclusion of women from jury duty), *appeal docketed sub nom. Edwards v. Healy*, 42 L. W. 3307 (No. 73-759, Nov. 12, 1973).

The prejudice to Dr. Levy in an arbitrary and exclusive "jury" selection procedure was compounded by command influence and the absolute discretion of the convening authority to appoint the "best qualified" men to the panel.⁶⁵ Discretionary standards for juror selection may be facially constitutional, *Turner v. Fouché*, 396 U.S. 346 (1970), but this Court has consistently held that such discretion may not be exercised to insure non-representational juries. *United States v. Mississippi*, 380 U.S. 128 (1965); *Avery v. Georgia*, 345 U.S. 559 (1953); *Williams v. Georgia*, 349 U.S. 375 (1955). Dr. Levy's "jury" consisted of ten career officers, nine from the infantry and one from the artillery. They ranged in rank from major to colonel. Their average age was 41 years and, including time spent in military colleges, their average length of service was 19.3 years.⁶⁶ Four had served in Vietnam, one of them losing an eye there in a "friendly mine field."

Dr. Levy was faced by a "venire" selected by the General who ordered him court-martialed. His G-2 dossier was in the possession of one of the General's Colonels. His Article 32 Investigation had been conducted by one of the General's Lieutenant Colonels. The military defense and prosecuting attorneys had been selected by the senior partner in the General's law firm—the Staff Judge Advocate. The General's "corporate counsel" had other members of the "firm" draw up the charges; he reviewed the proceedings and gave his client post-trial recommendations regarding

⁶⁵ Article 25 (d) (2), UCMJ provides: "When convening a court-martial the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. . . ."

⁶⁶ Exh. C, to the Petition for Habeas Corpus, p. 122.

the trial and sentence. Then the General had the right to reverse the conviction or reduce the sentence.⁶⁷

The problem of "command influence" has plagued the system of military justice both before and after the passage of the Uniform Code of Military Justice. See *Reid v. Covert*, 354 U.S. 1, 36 (1957); Note, *Judicial Checks on Command Influence Under the Uniform Code of Military Justice*, 63 YALE L. J. 880 (1954). Command influence in selection of court-martial members was regarded by the principal author of the UCMJ, Professor Edmund M. Morgan, as pervasive, the protections inadequate, and the problem nearly insurmountable short of civilian control. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 179, 183-84 (1953).

Any trial advocate would trade most procedural right in the Bill of Rights for the right to choose the jury. In the military, it is the commander who chooses the jury, and who controls courts-martial through the explicit or implicit use of disciplinary powers and the power to build or destroy military careers through efficiency reports.

The members of a court-martial panel must personally feel that professional, social, and economic consequences to them may hinge on their decision. They know that the General would not have convened them in the first place unless he felt that the accused had done some-

⁶⁷ "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist*, No. 47 (Hamilton, ed. 1880, quoting James Madison), as quoted in *United States v. Brown*, 381 U.S. 437, 443 (1965).

thing wrong;⁶⁸ thus a finding of guilt cannot hurt, and probably will help, their careers.⁶⁹

B. The unfairness of discriminatory "jury" selection procedures in the military is enhanced because:

1. The "jury" may convict by a two-thirds vote.⁷⁰
2. Each side has only one peremptory challenge.⁷¹
3. Challenges for cause are heard and voted on by the challenged officer's fellow court members.⁷²

⁶⁸ "The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this chapter and is warranted by evidence. . . ." Art. 34(a), UCMJ [Emphasis added.]

⁶⁹ This influence is certainly more pervasive than the mere "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial . . ." that will, on due process grounds, necessitate a change of venue. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

⁷⁰ The death penalty may only be imposed by a unanimous vote of the court-martial. Conviction for all non-capital offenses may be had upon "the concurrence of two-thirds of the members present at the time the vote is taken." Art. 52 (a)(2), UCMJ. This Court held in *Apodaca v. Oregon*, 406 U.S. 404 (1972) that majority verdicts in state criminal cases are not unconstitutional. But unanimity is required in federal criminal cases. *Andres v. United States*, 333 U.S. 740, 748 (1948); *Patton v. United States*, 281 U.S. 276 (1930). However, even *Apodaca* presupposes that non-unanimous juries represent a cross section of the community and are untouched by command influence. It thus has no precedential value here.

As we said in *Williams v. Florida*, 399 U.S. 78 (1970), a jury will come to such a [fair] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. 406 U.S. at 410-11.

⁷¹ Art. 41, UCMJ provides:

(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the law officer may not be challenged except for cause.

⁷² At the time of *Dr. Levy's* court-martial Art. 41, UCMJ pro-
(footnote continued on next page)

While he objected to the Article 41 procedures, rather than risk antagonizing his self-qualifying court-martial, Dr. Levy made no challenges. R. Vol. 3, pp. 42-43. His non-exercise of the one peremptory challenge allowed him to keep the number of votes of court members required for conviction at seven. Had he exercised his permitted challenge to one of the ten court members only six conviction votes (two-thirds of nine) would have been necessary. His was the "grisly" Hobson's choice" of *Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

C. The Article 32 investigation procedure in this case was unconstitutional since the investigating officer, appointed by the convening authority, was subject to the same pervasive effect of command influence as the members of the court-martial.⁷³ Dr. Levy was to that extent deprived of procedural fairness at a critical stage

(footnote continued from preceding page)

vided:

- (a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

Article 41 was amended on October 24, 1968, so that now the "military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause. . . ."

⁷³ Appellee's objections are noted at R. Vol. 3, pp. 44, 46-7. Article 32 provides:

- (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

of the proceedings against him.⁷⁴ *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

In addition, the exclusion of the press from the Article 32 investigation over Dr. Levy's objection violated first, fifth and sixth amendment guarantees. R. Vol. 3, p. 47, and A. 360. Our nation has an "historic distrust of secret proceedings, [with] their inherent dangers to freedom. . . ." *In re Oliver*, 333 U.S. 257, 273 (1948). The public trial guarantee with "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270.⁷⁵ While the Court of Military Appeals has held that there is no requirement that Article 32 investigations be open to the public, *MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970), where an accused has waived any interest he may have in a private hearing, requests that the proceedings be public, and where no legitimate governmental interest in preventing disclosure of classified information is present, no justification for holding the Article 32 investigation in private exists.

D. The prosecutor played a preferred role in Dr. Levy's prosecution. He served as a sort of clerk, bailiff, district attorney, sheriff, *amicus*, custodian, and special

⁷⁴ The Article 32 investigation both operates "as a discovery proceeding for the accused and stands as a bulwark against baseless charges." *United States v. Samuels*, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959).

⁷⁵ Other benefits noted were that (1) publicity may move witnesses unknown to the parties to come forward, and (2) spectators may learn about their government and acquire confidence in judicial remedies. *Cf.* the 437 potential witness questionnaires concealed from the defense.

investigator, as he does in all courts-martial. The prosecutor administers oaths (he even swears in the law officer, now military judge) and issues subpoenas (his own and those of the defense, unless he decides he doesn't want to issue the defense subpoenas, in which case he requires the defense to tell the General who convened the court-martial in the first place why they are relevant).⁷⁶

He sends notices to the court, takes muster when the court convenes, announces the appointing order, and generally, serves as the man upon whom the court-martial can safely rely. He identifies witnesses, swears them in and has them point the accusing (identifying) finger at the defendant.⁷⁷

Courts have implemented the right to a fair trial by purging the courtroom of inequality between prosecution and defense. Insofar as possible distinctions between rich and poor are abolished. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). A defendant may not be denied the presumption of innocence by being tried in prison clothes, *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971), nor forced to prove his own innocence. *Cool v. United States*, 409 U.S. 100 (1972). The Government is not to enter a case with an initial advantage, and it is presumed that only competent evidence of guilt will suffice for conviction. In Dr. Levy's case, however, the prosecutor was entrusted with special duties which enhanced his status in the eyes of the court. His purely adversary functions acquired an increment of authority and to that extent facilitated conviction. Where the

⁷⁶ See MCM, ¶ 115a (1969).

⁷⁷ Dr. Levy's objections to the preferred "insider" role of the prosecutor were overruled. R. Vol. 3, pp. 38-40, 51-56; R. Vol. 7, p. 2248.

fairness of justice is involved, in fact as well as appearance, a showing of actual prejudice is not required. *Avery v. Georgia*, 345 U.S. 559 (1953).

E. The Staff Judge Advocate's role insured unfairness. The Staff Judge Advocate, the General's lawyer, appoints both the prosecution and defense counsel, helps draft charges, advises the General, no doubt helps select court members, and at the conclusion of the trial makes recommendations to the General.⁷⁸

Here he and his deputies performed above, beyond, and contrary to the UCMJ's⁷⁹ call to duty. His presence permeates the Record, *See, e.g.*, R. Vol. 2, report of 1 March 1967 Exh. 2, p. 22; *id.* Exh. 3, p. 2; *id.* Vol. 13, App. Exh. 7, pp. 310-11, 387, 711; R. Volumes 13-15, 19, *passim*, and to use the language of *Pickering v. Board of Education*, 391 U.S. 563, 578-79, n.2 (1968) was an "obvious defect . . . in the fact-finding process."

F. The atmosphere at Fort Jackson required that Dr. Levy's request for a change of venue be granted. R. Vol. 7, pp. 2242-47. Major Parsons, who had lost the sight of one eye in a mine field in Vietnam, was threatened on the night before the deliberations began. R. Vol. 9, pp. 2632-33. A physician witness attempted to take the fifth amendment because he feared the "military law"; he feared the Army's power to send him to Vietnam if he testified adversely to Army interests. R. Vol. 6, pp. 2090, 2094, 2100-01. Another defense witness, a Fort Jackson physician, felt the mood and knew the pressure, R. Vol. 7, pp. 2181-82, and had, in

⁷⁸ Dr. Levy's objections to the multiple roles played by the Staff Judge Advocate were overruled. R. Vol. 3, pp. 46-47.

⁷⁹ *See, e.g.*, the disqualifications of Article 6 (c), particularly as to an investigating officer thereafter acting as Staff Judge Advocate.

fact, been threatened by an enlisted man who thought he was Dr. Levy. *Id.* Finally, the public information officer circulated a brochure discrediting a defense witness. R. Vol. 7, pp. 2246-48. In *Groppi v. Wisconsin*, 400 U.S. 505, 514 (1971), this Court held that changes of venue may be commanded upon proper showing even in misdemeanor cases: "unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated." (Mr. Justice Blackmun, joined by Chief Justice Burger, concurring.)

There was a climate of prejudice at Fort Jackson. Under constitutional standards for changing venue, Dr. Levy was entitled to be tried elsewhere. See *Shepard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959). Cf. *ABA Standards Relating to Fair Trial and Free Press* §§2.1, 3.2(c) (1968).

Tried by a jury from which women, enlisted men, non-career personnel and those equal to or lower in rank than he had been excluded and which was self-qualifying and needed only a two-thirds majority to convict; where command influence was the dominating fact of life; where the prosecutor played a special insider's role as did the Staff Judge Advocate; and tried on an Army post where witnesses feared to testify, Dr. Levy was court-martialed in a manner which failed to meet minimum constitutional standards. This Court could affirm on that basis alone. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

CONCLUSION

For the foregoing reasons, appellee urges that the Court should dismiss the appeal for failure to file a legally sufficient notice of appeal, or in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

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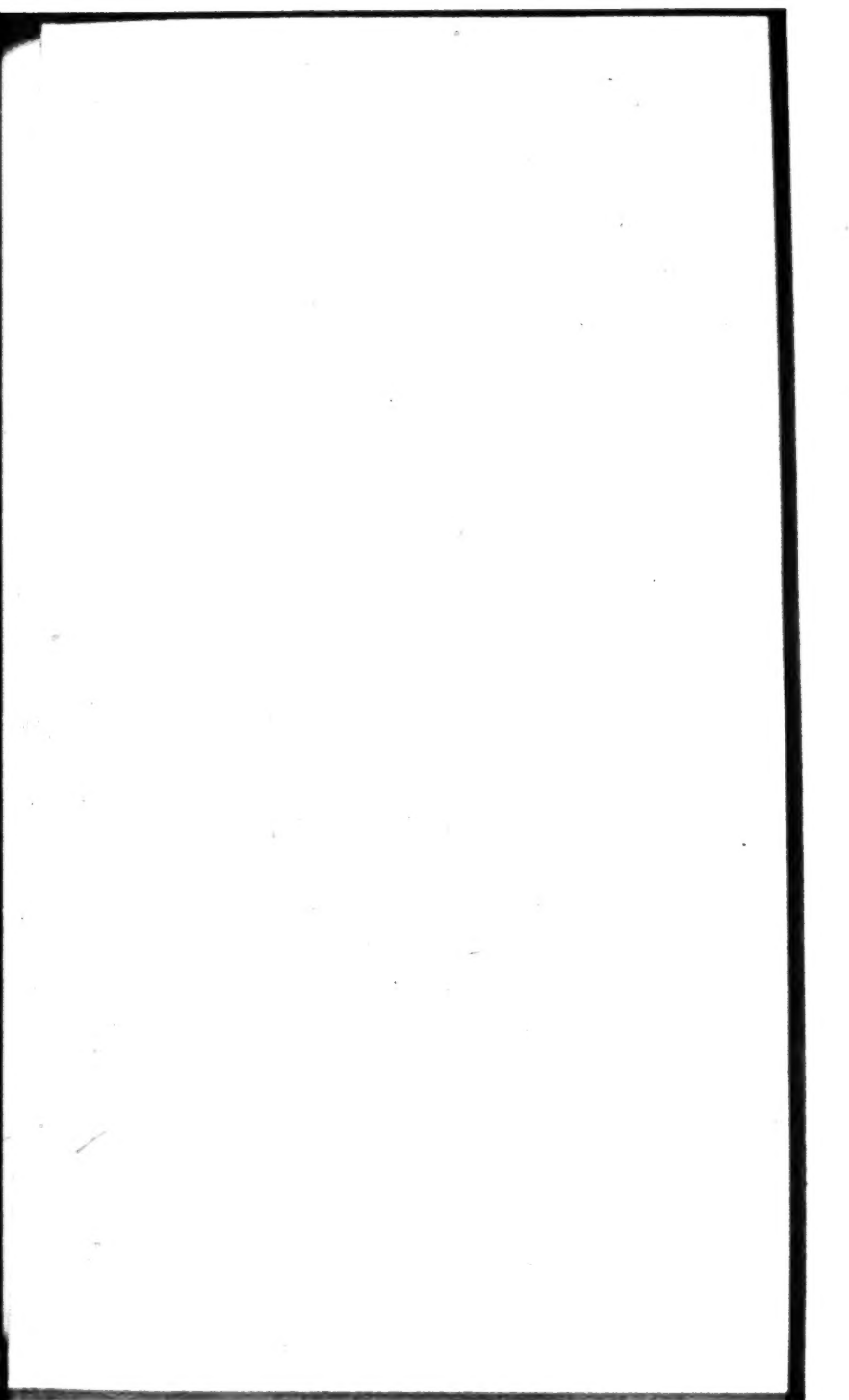
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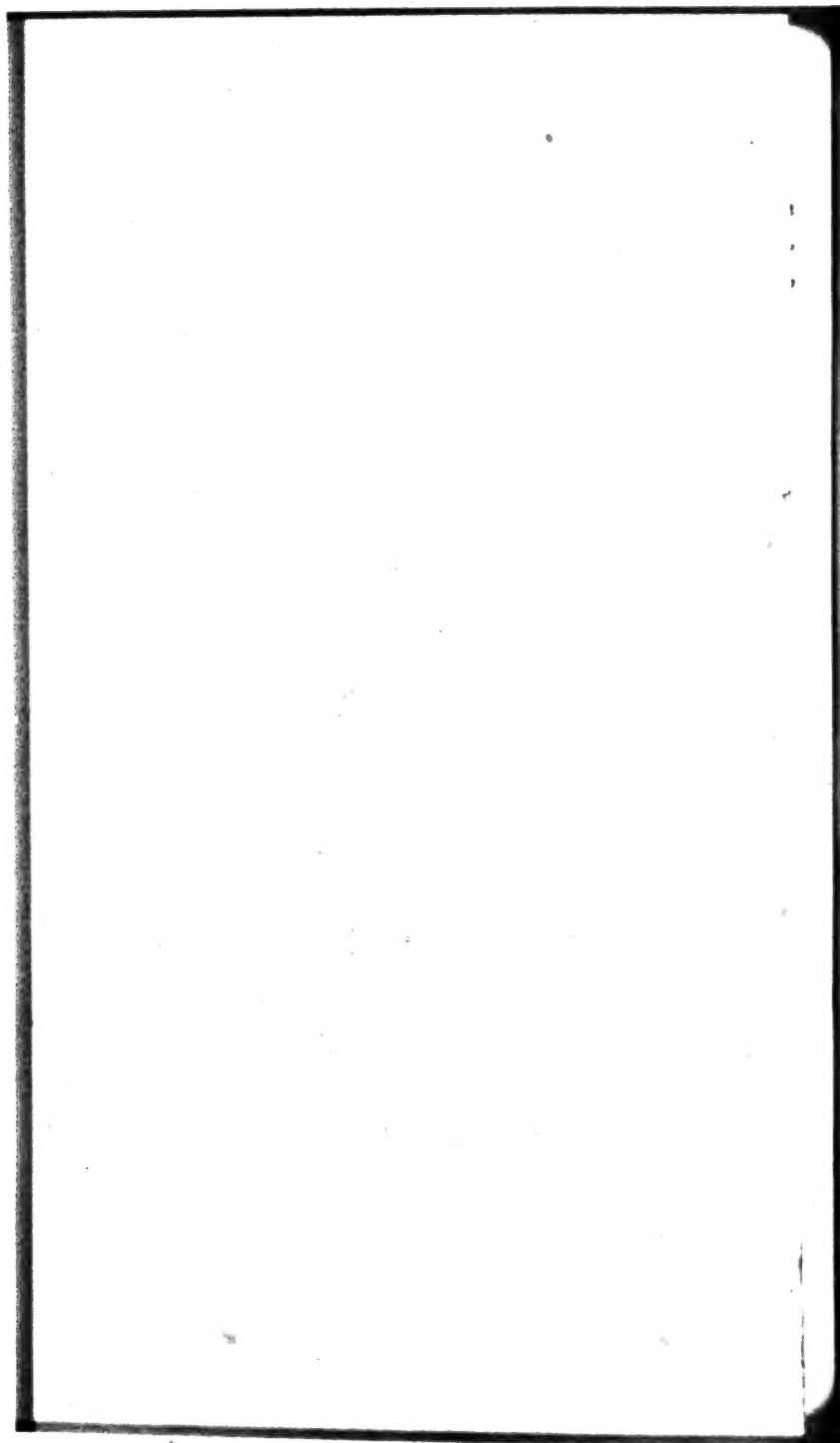
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IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 73-206

JACOB J. PARKER, et al.,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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TABLE OF CONTENTS

	PAGE
Interest of the Amicus Curiae	2
Statutes Involved	3
Questions Presented	4
Statement of the Cases	4
Summary of Argument	4
 Argument:	
Point I:	
Article 134 is unconstitutional on its face	6
A. Article 134 is unconstitutionally vague	7
1. Article 134 does not give fair warning of what conduct is proscribed	9
2. Article 134 fails to provide explicit en- forcement standards	18
B. Article 134 is unconstitutionally overbroad	23
C. No countervailing military necessity	24
D. The effect of unconstitutionality	25
 Point II:	
Article 133 is unconstitutional on its face	27
Conclusion	33

TABLE OF AUTHORITIES

Cases

<i>Burns v. Wilson</i> , 346 U.S. 137 (1953)	17
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	8
<i>Brown v. Board of Education</i> , 349 U.S. 294 (1954)	16

<i>Carter v. McClaughry</i> , 183 U.S. 365 (1902)	17
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927)	7
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971)	
	7, 9, 22, 23, 24, 32
<i>Connally v. General Construction Co.</i> , 269 U.S. 385	
(1926)	7, 8, 18
<i>Corporation of Haverford College v. Reeher</i> , 329 F.	
Supp. 1196 (E.D. Pa. 1971)	7
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	17, 24
<i>Dynes v. Hoover</i> , 61 U.S. (20 How.) 65 (1858) ...	15,
	16, 17
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	20-21,
	31
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	7, 22,
	24, 25, 31, 32
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	7, 8,
	19, 21, 23, 31
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	17
<i>Kauffman v. Secretary of the Air Force</i> , 415 F.2d	
991 (D.C. Cir. 1969)	17
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1938)	7, 9,
	22, 23, 28, 31
<i>Levy v. Parker</i> , 396 U.S. 1204 (1969)	15, 26
<i>Ex parte Milligan</i> , 71 U.S. (4 Wall.) 2 (1866)	17
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	25
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1969)	26
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156	
(1972)	7, 8, 16, 22, 31
<i>Reid v. Covert</i> , 354 U.S. 1 (1957)	10
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	16

	PAGE
<i>Scott v. Sanford</i> , 60 U.S. (19 How.) 393 (1857)	16
<i>Union Bridge Company v. United States</i> , 204 U.S. 364 (1905)	10
<i>United States v. Adams</i> , 21 C.M.R. 34 (AFBR 1956)	14
<i>United States v. Alexander</i> , 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953)	13
<i>United States v. Annal</i> , 13 U.S.C.M.A. 427, 32 C.M.R. 427 (1963)	13
<i>United States v. Berry</i> , 6 U.S.C.M.A. 638, 20 C.M.R. 325 (1956)	13
<i>United States v. Butler</i> , 11 C.M.R. 445 (ABR 1953)	14
<i>United States v. Cardiff</i> , 344 U.S. 174 (1952)	7, 22
<i>United States v. Caune</i> , 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973)	19
<i>United States Civil Service Commission v. National Association of Letter Carriers</i> , 413 U.S. 458 (1973)	8, 11, 12, 30
<i>United States v. Cohen Grocery Co.</i> , 255 U.S. 81 (1921)	7
<i>United States v. Cole</i> , 30 C.M.R. 755 (USCG Action of General Counsel as Supervisory Authority 1961)	14
<i>United States v. Community TV Inc.</i> , 327 F.2d 797 (10th Cir. 1964)	7
<i>United States v. Cowan</i> , 12 C.M.R. 375 (ABR 1953)	14
<i>United States v. Cramer</i> , 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957)	13
<i>United States v. Daniels</i> , 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970)	24
<i>United States v. Davis</i> , 27 C.M.R. 908 (CGBR 1958)	20

<i>United States v. Day</i> , 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960)	19
<i>United States v. Downard</i> , 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1956)	20
<i>United States v. Eaton</i> , 144 U.S. 677 (1892)	10
<i>United States v. Fisher</i> , 6 C.M.R. 195 (ABR 1952) .	10
<i>United States v. Floyd</i> , 18 C.M.R. 362 (ABR 1954), <i>pet. denied</i> , 6 U.S.C.M.A. 817, 19 C.M.R. 413 (1955)	13, 14
<i>United States v. Francis</i> , 12 C.M.R. 695 (AFBR 1953), <i>pet. denied</i> , 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953)	20
<i>United States v. Frantz</i> , 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953)	8, 15
<i>United States v. Freeman</i> , 15 C.M.R. 639 (AFBR 1954), <i>pet. denied</i> , 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954)	20
<i>United States v. George</i> , 228 U.S. 14 (1913)	10
<i>United States v. Goldie</i> , 1 C.M.R. 495 (NBR 1951)	14
<i>United States v. Gray</i> , 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970)	24
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911)	10
<i>United States v. Hubbard</i> , 12 C.M.R. 492 (AFBR 1953)	20
<i>United States v. Harbin</i> , 20 C.M.R. 925 (AFBR 1955)	14
<i>United States v. Herndon</i> , 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965)	13
<i>United States v. Holt</i> , 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957)	10, 13
<i>United States v. Howe</i> , 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967)	8, 24, 32
<i>United States v. Hunt</i> , 18 C.M.R. 498 (ABR 1954)	13

	PAGE
<i>United States v. Jackson</i> , 8 C.M.R. 215 (ABR 1952), pet. denied, 2 U.S.C.M.A. 677, 8 C.M.R. 198 (1953)	14
<i>United States v. Johnson</i> , 5 C.M.R. 268 (ABR 1952)	20
<i>United States v. Lee</i> , 4 C.M.R. 185 (ABR 1952), pet. denied, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952) ..	14
<i>United States v. LeFort</i> , 15 C.M.R. 596 (CGBR 1954)	20
<i>United States v. Livingston</i> , 8 C.M.R. 206 (ABR 1952), pet. denied, 1 U.S.C.M.A. 676, 8 C.M.R. 178 (1953)	14
<i>United States v. Mallory</i> , 17 C.M.R. 409 (ABR 1954)	14
<i>United States v. Manos</i> , 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958)	19-20
<i>United States v. Martinson</i> , 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971)	13
<i>United States v. Maze</i> , 42 C.M.R. 376 (ACMR (1970), rev'd on other grounds, 20 U.S.C.M.A. 29, 44 C.M.R. 29 (1971)	13
<i>United States v. McCormick</i> , 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960)	11, 22
<i>United States v. Menta</i> , 39 C.M.R. 956 (AFBR 1968)	20
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<i>United States v. Norris</i> , 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953)	20
<i>United States v. Ortega</i> , 45 C.M.R. 576 (ACMR 1972)	13
<i>United States v. Priest</i> , 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972)	24
<i>United States v. Ragan</i> , 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963)	13

	PAGE
<i>United States v. Reese</i> , 92 U.S. 214 (1875)	7, 22
<i>United States v. Rio Poon</i> , 26 C.M.R. 830 (CGBR 1958)	20
<i>United States v. Sadinsky</i> , 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964)	13
<i>United States v. Sanchez</i> , 11 U.S.C.M.A. 218, 29 C.M.R. 32 (1960)	13
<i>United States v. Schneider</i> , 27 C.M.R. 566 (ABR 1958)	20
<i>United States v. Unrue</i> , U.S.C.M.A. , 46 C.M.R. 1326 (Misc. Doc. 1973)	15
<i>United States v. Shoenberg</i> , 16 U.S.C.M.A. 425, 37 C.M.R. 45 (1966)	13
<i>United States v. Siniger</i> , 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1956)	20
<i>United States v. Smart</i> , 12 C.M.R. 825 (AFBR 1953)	20
<i>United States v. Snyder</i> , 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952)	13
<i>United States v. Walker</i> , 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972)	16
<i>United States v. Walter</i> , 11 C.M.R. 355 (ABR 1953), <i>rev'd on other grounds</i> , 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954)	20
<i>United States v. Waluski</i> , 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956)	20
<i>United States v. White</i> , 7 C.M.R. 764 (AFBR 1953)	14
<i>United States v. Will</i> , 25 C.M.R. 674 (ABR 1958) ..	20
<i>United States v. Witzell</i> , 12 C.M.R. 269 (ABR 1953) ..	14
<i>United States v. Wolverton</i> , 10 C.M.R. 641 (AFBR 1953)	20
<i>United States v. Woodard</i> , 17 C.M.R. 813 (AFBR 1954)	14
<i>Viereck v. United States</i> , 318 U.S. 236 (1943)	10

CONSTITUTION AND STATUTES

United States Constitution, First Amendment	7, 23, 24, 32
United States Constitution, Fifth Amendment	6, 8, 12, 22
5 U.S.C. § 7324 (a) (2)	11
18 U.S.C. § 13	3
Article XXXII—Rules for Government of the Navy, enacted 23 April 1800, 2 Stat. 45	15
Article of War, Article 97, 18 Stat. 1342 (1874) . . .	17
<i>Uniform Code of Military Justice:</i>	
Articles 15-20 (10 U.S.C. §§ 815-820)	19
Article 34 (a) (10 U.S.C. § 834 (a))	19
Article 36 (a) (10 U.S.C. § 836 (a))	11
Article 56 (10 U.S.C. § 856)	11
Article 133 (10 U.S.C. § 933)	<i>passim</i>
Article 134 (10 U.S.C. § 934)	<i>passim</i>
5 C.F.R. § 733	11

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Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Depart- ment of Transportation pursuant to the Uniform Code of Military Justice for the period January 1, 1972, to December 31, 1972	26
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	PAGE
Gaynor, <i>Prejudicial and Discreditable Military Conduct, A Critical Appraisal of the General Article</i> , 22 <i>Hastings L. J.</i> 259 (1971)	27
Hodson, <i>Perspective, the Manual for Courts-Martial</i> , 1984, 47 <i>Mil L Rev.</i> 1 (1972)	26
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Paragraph 26b	32
Paragraph 32	19
Paragraph 73a	21
Paragraph 127c	10
Paragraph 212	28, 31
Paragraph 213b	9, 10
Paragraph 213c	10
Paragraph 213d	21
Paragraph 213f	10
Appendix 6—Forms for Charges and Specifications	10
Quinn, <i>The United States Court of Military Appeals and Individual Rights in the Military Service</i> , 35 <i>Notre Dame Lawyer</i> 401 (1960)	24
Reynolds, <i>The Officer's Guide</i> (1969)	29
Note, <i>Taps for the Real Catch-22</i> , 81 <i>Yale L. J.</i> 1518 (1972)	10, 29, 32
Task Force on the Administration of Military Justice in the Armed Forces (1972)	26
Wiener, <i>Are The General Military Articles Unconstitutionally Vague?</i> , 54 <i>A.B.A.J.</i> 357 (1968) ..	27
Wiener, <i>Courts-Martial and the Bill of Rights, The Original Practice II</i> , 72 <i>Harv. L. Rev.</i> 266 (1958)	16

IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 73-206

JACOB J. PARKER, *et. al.*,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF *AMICUS CURIAE* ON BEHALF OF THE
ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK**

The Association of the Bar of the City of New York files this brief pursuant to Rule 42 of the United States Supreme Court. Both appellants and appellees have consented to the filing of this brief, and copies of their consents have been filed with the Clerk of this Court.

Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of more than 10,200 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standing of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

The Committee on Military Justice and Military Affairs is a Standing Committee of the Association, appointed by the President of the Association. There are at present 24 members of the Association on the Committee. The Chairman is Marvin M. Karpatkin, an active practitioner in this field, who is a General Counsel of the American Civil Liberties Union and an Adjunct Professor of Law at New York University School of Law. Other members include a law school dean, a judge of the Criminal Court of the City of New York, and the General Counsel of the NAACP. Two of the members are currently on active duty practicing criminal law in the Army Judge Advocate General's Corps; most of the members are former members of the armed services, many of them of the legal branches of those services; one is a recently retired Captain in the U.S. Coast Guard whose last assignment was Chief Legal Officer at the largest Coast Guard installation in the country, Governor's Island; and many of the members have, as military and civilian lawyers, represented servicemen and servicewomen.

The Committee's Subcommittee on the Uniform Code of Military Justice was asked by the Chairman of the Committee to study the constitutionality of Article 133 (Conduct Unbecoming an Officer and a Gentleman) and Article 134 (General Article) of the Uniform Code of Military Justice. After due consideration, an overwhelming majority of the Subcommittee decided that Article 133 and the first two clauses of Article 134 were unconstitutionally vague and overbroad, and this finding was adopted by an overwhelming majority of the Committee at its December 1973 meeting. The Association believes that the Committee's views will be helpful to this Court in resolving one of the key legal issues presented by the appeals at bar, and has granted the Committee permission to file this brief in its behalf.

Statutes Involved

Article 133 of the Uniform Code of Military Justice (10 U.S.C. § 933) provides in pertinent part:

Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 of the Uniform Code of Military Justice (10 U.S.C. § 934) provides in pertinent part:*

Though not specifically mentioned in this chapter, [1] all disorders and neglects to the prejudice of good order and discipline in the armed forces,

* The third clause of Article 134 provides trial by court-martial for "crimes and offenses not capital." This clause is used to charge violations of federal law not elsewhere proscribed in the Uniform Code of Military Justice, and violations of state law incorporated under the Assimilative Crimes Act, 18 U.S.C. § 13. Although this clause was mentioned in the opinion of the Third Circuit in the *Levy* case, 478 F. 2d at 790, we do not believe it is involved in these appeals, and we offer no views as to its constitutionality. References in this brief to "Article 134" are meant to encompass only the first two clauses.

[and] [2] all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Questions Presented

1. Whether Article 133 and Article 134 of the Uniform Code of Military Justice are unconstitutionally vague and overbroad.

2. In the case of a felony prosecution, should the armed services be held to the requirement of specificity imposed on civilians?

Because of the parties' individual interests and their exhaustive treatment of all of the issues involved in these appeals, we confine ourselves to discussion of the issues we consider most important as a matter of constitutional policy: the facial constitutionality of Article 133 and Article 134. We will not discuss the other issues raised or briefed by the parties.

Statement of the Cases

Amicus incorporates the statement of the *Avrech* case as outlined in Appellee Avrech's brief, and the statement of the *Levy* case as outlined in the Appellant government's brief.

Summary of Argument

A statute which either forbids or requires the performance of an act in terms which are so vague that the average reasonable man is forced to guess at its meaning, interpretation, and application, is unconstitutionally vague and overbroad, and violates due process of law.

I

Article 134 is so broad in scope that it gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.

Furthermore, although the *Manual for Courts-Martial, United States* (rev. ed. 1969), hereinafter referred to as *Manual*, (the administrative regulations governing military discipline which have been promulgated pursuant to the Uniform Code of Military Justice) does contain a number of precise specifications which can be used to charge a serviceman or servicewoman with a crime, administrative regulations cannot be used to validate an otherwise unconstitutional statute. In addition, the specifications in the *Manual* are not all encompassing; they are only examples of conduct which might be considered to come under the Article. Accordingly, the Article as applied represents a limitless catchall, without a unifying theme, for various types of vague misconduct not otherwise codified, ranging from abusing animals to wearing unauthorized insignia.

Moreover, there is no valid countervailing military justification for suspending the application of the constitutional right of fair warning to a penal statute which prescribes serious criminal penalties to offenders, as opposed to administrative sanctions. The good order and discipline necessary to accomplish the mission of the armed services can be achieved by means of a statute more clearly in accord with constitutional guidelines.

Thus, this Article is unconstitutionally vague and overbroad.

II

Article 133, which applies only to officers, suffers from the same vagueness and lack of military justification as Article 134. In addition, neither this Article nor the *Manual* explain what conduct "unbecomes" an officer or a gentleman. Moreover, the word "gentleman" is a highly subjective, amorphous term and open to abuse. It is unclear who is to decide what is or is not "gentlemanly" conduct, especially in a time of changing values and mores. There is grave doubt that the statute gives fair notice of the crimes intended to be covered.

Thus, this Article is unconstitutionally vague and overbroad.

ARGUMENT

POINT I

Article 134 is unconstitutional on its face.

We submit that the convictions of appellees for violation of Articles 133 and 134 in the instant cases must be held violative of the due process clause of the Fifth Amendment because the statute is unconstitutionally vague and overbroad.¹

At the outset, it is important to recognize that although both of the instant cases are "free speech" cases, we do not confine our argument to that area of constitutional interpretation. Rather, unfettered by partisan interests, we urge that this Court rule in these cases on strict constitutional policy grounds. This Court has held a hard line against vague criminal statutes which offend the constitutional norm of due process. Moreover, this Court has not limited its application of the vagueness doctrine to "free speech" cases; decisions abound concerning vague statutes

1. As to the question of retroactivity, see note 14 *infra*.

which seek to regulate a wide range of activities, both within and without the context of the First Amendment. *Gooding v. Wilson*, 405 U.S. 518 (1972) (free speech); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy law); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (freedom of association); *United States v. Cardiff*, 344 U.S. 174 (1952) (FDA inspection statute); *Lanzetta v. New Jersey*, 306 U.S. 451 (1938) ("gangster" label statute); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (anti-trust profit controls); *Connally v. General Construction Co.*, 269 U.S. 385 (1926) (minimum wage law); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921) (price controls); and *United States v. Reese*, 92 U.S. 214 (1875) (statute describing violations of the Fifteenth Amendment by election officials).²

We suggest that the Court's holding in the cases at bar need not be restricted to a decision on First Amendment grounds. Rather, as we point out *infra*, Articles 133 and 134 do not meet constitutional standards of due process for reasons in addition to their capacity to stifle exercise of First Amendment freedoms. For that reason we meet the question of facial constitutionality of these statutes considering that their infirmity goes far beyond even the important First Amendment considerations.

A. Article 134 is unconstitutionally vague.

The requirement for specificity in drafting criminal statutes is a "basic principle of due process." *Grayned v.*

2. Other federal courts have also applied the vagueness concept in areas other than free speech. See *Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971) (state statute denying financial aid to convicted misdemeanants). See also *United States v. Community TV, Inc.*, 327 F. 2d 797 (10th Cir. 1964) (excise tax laws must be applied on the basis of specific description of transaction covered, not by analogy).

City of Rockford, 408 U.S. 104, 108 (1972). Thus, a criminal statute must give fair warning to the citizenry of what conduct is prohibited. If the statute is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", it will be held violative of "the first essential of due process of law." (citations omitted) *Connally v. General Construction Co.*, *supra*, 269 U.S. at 391. Furthermore, a criminal statute must present those who apply it with "explicit standards" for application in order to prevent "arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville*; *Grayned v. City of Rockford*, *supra*.

These principles are part of the very fibre of the due process clause of the Fifth Amendment, and have been reaffirmed by this Court most recently in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). See *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Moreover, the standards applied by this Court in the civilian context have been held applicable as well to statutes governing the conduct of military personnel. *United States v. Howe*, 17 U.S.C.M.A. 165, 176-79, 37 C.M.R. 429, 440-43 (1967). See also *United States v. Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).

Accordingly we submit that the terms of Article 134, prohibiting "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces" do not meet the requirements of fair warning and establishment of ascertainable standards for enforcement. Thus, Article 134 is unconstitutionally vague and offends the basic principles of due process required by the Fifth Amendment.

1. Article 134 does not give fair warning of what conduct is proscribed.

On its face, the statute gives no notice to the serviceman from which he may determine what type of conduct is "prejudicial to good order and discipline" or service-discrediting. Appellant argues however, that this "generalized language . . . gains meaning from and embodies the well-settled customs and practices of the military community; and that those members therefore have sufficient notice of what conduct is prohibited by the Article. (Appellant's Brief in *Avrech* at 27). We submit that careful examination of the components of the "customs and practices of the military community" does not support that conclusion.

Appellant has relied specifically on the provisions of the *Manual* and the body of military and civilian case law interpreting the general article (Appellant's Brief in *Avrech* at 28). Reliance on the *Manual* to fill the void created by the vague facial language of Article 134 is unsatisfactory. First, it is doubtful whether resort may be had to such a publication for this purpose, for, as this Court has held, if a statute is vague on its face, "specification of the details of the offense[s] intended to be charged would not seem to validate it." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1938). See also *Coates v. City of Cincinnati*, *supra*. In any event, the *Manual* itself does not satisfy due process notice requirements because it is open-ended and does not contain a description of all offenses which may be punished under this Article.

The *Manual*, as a general guide, states that prosecution under the first clause of Article 134 is limited to cases in which the prejudice to good order and discipline is "reasonably direct and palpable" (paragraph 213b), and that, the second clause of the Article is intended to proscribe conduct which "has a tendency to bring the service into

disrepute or which tends to lower it in public esteem" (paragraph 213c). But these terms suffer from the same vagueness problem as the language of Article 134 itself. How is the serviceman to know what conduct constitutes a "reasonably direct and palpable" prejudice to good order and discipline? How is he to know which of his acts will have a "tendency to bring the service into disrepute?" Examination of the *Manual's* sixty-three model specifications under this Article (Appendix 6c), the discussion of fourteen of the offenses in some detail (in paragraph 213f), and the listing of many of those and other offenses in the Table of Maximum Punishments (paragraph 127c), is unsatisfactory because the list is not intended to be exclusive, but is purposely "elastic." *United States v. Fisher*, 6 C.M.R. 195, 199 (ABR 1952). See also *United States v. Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957). Indeed, the *Manual* and Article 134 themselves restrict the punishable offenses only by noting that they must be "not specifically mentioned" in another article of the Code (*Manual*, paragraph 213b).

Reference to the *Manual* to give definition to Article 134 is unsatisfactory also because the *Manual* is promulgated pursuant to Executive Order and does not constitute a body of substantive law. Such a procedure would raise serious constitutional questions.³ The United States Court

3. We agree with appellant's position that "The status of the *Manual's* specifications as substantive military law is unsettled" (Appellant's Brief in *Avrech* at 30, n. 14). See *Reid v. Covert*, 354 U.S. 1, 38 (1957). However, we urge this Court to reject a scheme whereby the Executive may legislate substantive criminal conduct, a task traditionally and rightly within the exclusive province of the Congress. In this regard see Note, *Taps for the Real Catch-22*, 81 Yale L.J. 1518, 1523-24 (1972). See *United States v. Eaton*, 144 U.S. 677 (1892); *Viereck v. United States*, 318 U.S. 236, 241 (1943); *United States v. George*, 228 U.S. 14 (1913); *United States v. Grimaud*, 220 U.S. 506 (1911); *Union Bridge Company v. United States*, 204 U.S. 364 (1905).

of Military Appeals itself has recognized that there is no "basis for the proposition that the President may create an offense under the Code". *United States v. McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 29 (1960). Thus, this Court should not allow reference to the *Manual* to define offenses under the general article in the absence of legislative provision for such reference. Congress has directed only that the President establish rules of procedure and evidence and fix maximum penalties, 10 U.S.C. §§ 836 and 856 (1970). He has done this in the *Manual* under Articles 36(a) and 56 of the Uniform Code of Military Justice, respectively. Nothing in the President's statutory grant of power permits the establishment of substantive criminal offenses. In any event, as discussed *infra*, the open-ended list of Article 134 offenses in the *Manual* may give notice of what has been punished on occasion in the past, but gives no warning of what other types of conduct will be considered proscribed in the future.

Contrary to the appellant's position (Brief in *Avrech* at 31), this Court's recent decision in *Letter Carriers*, *supra*, does not resolve the problem in the instant cases. That case held that a provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) was not void for vagueness, in part because it gave notice of a listing of prohibited and permitted activities contained in Civil Service Commission Regulations, 5 C.F.R. § 733. It is important to note that, unlike the *Manual*, the Civil Service Regulations do not purport to proscribe conduct which will lead to criminal prosecution. Indeed, the penalty for violation of the Hatch Act provision is removal from government service. While in itself a stringent punishment, such a sanction does not approach the deprivation of liberty and imposition of a punitive discharge which may result from a federal court-martial conviction. While in general there is no right to

employment with the federal government, the Fifth Amendment grants the right not to be tried, convicted or incarcerated without due process of law. Thus, the requirement for strict construction of penal statutes present in the instant cases was not present in *Letter Carriers*. Further, Congress specifically intended the Civil Service Commission to exercise a rule-making function for the political conduct of federal employees, although that power did not give the Commission a "subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate [the statute]," *Id.*, 413 U.S. at 571-72. In the case of the *Manual*, however, the list of substantive Article 134 crimes adopted by the President reflects the exercise of a legislative role which exceeds his delegated powers. Indeed, the changes in the *Manual* in 1968 and 1969 reflect an effort at a "more expansive definition" of conduct prohibited under the general article.⁴ Thus, a result in the instant cases which rejects resort to the *Manual* as an enactment of substantive Article 134 offenses would *not* conflict with the holding in *Letter Carriers*. The statutes, regulations and their purposes involve different policy considerations. We deal here with penal sanctions for criminal conduct, requiring the ultimate in specificity and strict statutory construction. *Letter Carriers* simply does not apply.

After the serviceman has been unable to determine from the *Manual* what conduct Article 134 proscribes, he is urged to examine the cases which have interpreted this Article (Appellant's Brief in *Avrech* at 28). However,

4. For example, the Article 134 crimes of obstructing justice, gambling with enlisted men, cohabitation, and burning with intent to defraud were not mentioned in the 1951 *Manual for Courts-Martial* but are included in the Table of Maximum Punishments in the *Manual* and model specifications are provided therefor.

the cases give little idea of what to expect by way of prosecution, for they interpret Article 134 to permit trial for a myriad of offenses not listed or even hinted at in the *Manual*.⁵ While a reading of the cases and the *Manual*

5. There are actually seventy-six offenses listed in the Table of Maximum Punishments for Article 134. Paragraph 127, *Manual for Courts-Martial*. The following offenses not listed in the *Manual* have been held violative of either or both of the first two clauses of Article 134:

Court of Military Appeals: Endangering military property even though no damage inflicted, *United States v. Martinson*, 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971); window peeping, *United States v. Shoenberg*, 16 U.S.C.M.A. 425, 37 C.M.R. 45 (1966); making telephone calls without paying, an offense which the court noted "sounded" in larceny, but even if not a "crime", it was serious service-discrediting conduct, *United States v. Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965); wrongfully jumping into the sea from an aircraft carrier, *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964); assaulting a specialist (as opposed to a non-commissioned officer) in the execution of his office, *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963); embracing another man, *United States v. Annal*, 13 U.S.C.M.A. 427, 32 C.M.R. 427 (1963); bestial acts with a chicken, *United States v. Sanchez*, 11 U.S.C.M.A. 218, 29 C.M.R. 32 (1960); defiling the flag, *United States v. Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957); cheating at calling out bingo numbers, *United States v. Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957); engaging in sexual intercourse in the presence of others (the couple in the next bed), *United States v. Berry*, 6 U.S.C.M.A. 638, 20 C.M.R. 325 (1956); accepting money to transport a Korean female in a government vehicle, *United States v. Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953); soliciting, without pay, other enlisted men to engage in sexual intercourse with a female, *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

Army Court of Military Review: Homosexual conduct not amounting to sodomy, *United States v. Ortega*, 45 C.M.R. 576 (ACMR 1972); altering an official document without intent to defraud, *United States v. Maze*, 42 C.M.R. 376 (ACMR 1970), *rev'd on other grounds*, 20 U.S.C.M.A. 29, 44 C.M.R. 29 (1971); resisting civil apprehension, *United States v. Hunt*, 18 C.M.R. 498 (ABR 1954); mistreating fellow POWs, *United States v. Floyd*, 18 C.M.R. 362 (ABR 1954), *pet. denied*, 6 U.S.C.M.A. 817, 19 C.M.R. 413

(Footnote continued on next page)

may give some idea what conduct was proscribed in the past, there is still no fair warning of what conduct is considered criminal today (nor was there then to those convicted in the cases listed in note 5, *supra*).

To solve the notice question of what conduct will be currently proscribed under Article 134, it has been argued that military men will know from the customs and traditions of the service what standard of conduct is expected of them in order to avoid prosecution under Article 134. In this regard, the Court of Military Appeals, citing the

(Footnote continued from previous page)

(1955); associating with a notorious prostitute, *United States v. Mallory*, 17 C.M.R. 409 (ABR 1954); soliciting and accepting money for showing an obscene movie, *United States v. Cowan*, 12 C.M.R. 375 (ABR 1953); borrowing from an enlisted man, *United States v. Witzell*, 12 C.M.R. 269 (ABR 1953); operating a bawdy house in government quarters, *United States v. Butler*, 11 C.M.R. 445 (ABR 1953); soliciting an enlisted man to go AWOL, *United States v. Jackson*, 8 C.M.R. 215 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 677, 8 C.M.R. 198 (1953); drinking with enlisted men, *United States v. Livingston*, 8 C.M.R. 206 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 676, 8 C.M.R. 178 (1953); masturbating in the presence of children, *United States v. Neill*, 4 C.M.R. 221 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 665, 5 C.M.R. 130 (1952); officer found in his apartment with enlisted man's wife during early morning hours, *United States v. Lee*, 4 C.M.R. 185 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952).

Air Force Court of Military Review: Inducing others to commit masturbation, *United States v. Adams*, 21 C.M.R. 734 (AFBR 1956); making obscene telephone calls, *United States v. Harbin*, 20 C.M.R. 925 (AFBR 1955); procuring a miscarriage, *United States v. Woodard*, 17 C.M.R. 813 (AFBR 1954); soliciting funds to act as defense counsel in a court-martial, *United States v. White*, 7 C.M.R. 764 (AFBR 1953).

Navy Court of Military Review: Striking another person in the Navy, *United States v. Goldie*, 1 C.M.R. 495 (NBR 1951).

Coast Guard: Chief Petty Officer having a female in his quarters at midnight, *United States v. Cole*, 30 C.M.R. 755 (USCG Action of General Counsel as Supervisory Authority 1961).

Manual as an example, has held that Article 134 has "acquired the core of a settled and understandable content of meaning." *United States v. Frantz, supra*, 7 C.M.R. at 39. Thus, that Court reasoned, because Article 134 has been used in military law since before the American Revolution,⁶ it must be considered "not *in vacuo*, but in the context in which the years have placed it." *Id.*

This argument seemingly finds support in *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858), which held that the predecessor of the general article was not void for vagueness because the article involved (Article XXXII, Rules for Government of the Navy, enacted 23 April 1800, 2 Stat. 45, 49) covered crimes that had been recognized as such "by the usages in the navy of all nations" and because "what the crimes are and how they are to be punished, is well known to practical men in the navy and army and by those who have studied the law of courts-martial." *Id.* at 82. Indeed, the Court of Military Appeals has refused to reconsider the constitutionality of Article 134, considering itself bound by the "precedent" of *Dynes*.⁷ We submit that reliance upon *Dynes* as precedent for the constitutionality of the present general article is completely misplaced, as demonstrated by the Court below in *Levy v. Parker, supra*, 478 F.2d at 785-88. Put simply, times have changed. While "practical men" in the service of their country in the nineteenth century may have been aware of the conduct proscribed by the general article of 1800, the same is hardly true today. Indeed, the sheer number of new and unlisted offenses under current military laws demonstrates

6. The history of this Article is amply discussed by the Circuit Courts below, in *Levy*, 478 F.2d at 784; in *Avrech*, 477 F.2d at 1240-41.

7. *United States v. Unrue*, U.S.C.M.A. , 46 C.M.R. 1326 (Misc. Doc. 1973).

the improbability of such awareness.⁸ Furthermore, in 1858 and throughout most of the nineteenth century the standing Army and Navy of the United States numbered in the hundreds. The pay was miserable and military service attracted only the dregs of society in the lower enlisted ranks. See Wiener, *Courts-Martial and the Bill of Rights, The Original Practice II*, 72 Harv. L. Rev. 266, 292, 301-02 (1958). The concept of a standing Army and Navy numbering in the millions, most of them conscripts, was totally foreign to the nineteenth century American thought. Surely rules which may have been necessary and proper for regulating the armed forces 115 years ago can no longer be assumed valid today, *ipso facto*. Any society which permitted the existence of the "peculiar institution", slavery, could hardly be expected to be overly concerned about the constitutional rights of soldiers and sailors. Wiener, *supra*, at 293.

This Court has consistently rejected the argument that contemporary interpretation of the Bill of Rights is dictated by standards which existed in times past. See *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion case) and *Papachristou v. City of Jacksonville*, *supra* (Elizabethan poor laws cannot be used to uphold vagrancy statutes because such theories no longer fit the facts). See also *United States v. Walker*, 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972) (concept that as times and facts change so must the reading of the Constitution fundamental to our system of government). Compare *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) with *Brown v. Board of Education*, 349 U.S. 294 (1954). (It is interesting to note that Justice McLean, the sole dissenter in *Dynes*, was also one of the two dissenters in the *Dred Scott* case).

8. See note 5, *supra*.

Finally, the scope of review by federal courts has increased greatly since *Dynes* was decided. See *Burns v. Wilson*, 346 U.S. 137 (1953); *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Dynes*, the Court followed the usual practice of applying strict common law rules of pleading and practice to *all* cases, civilian or military. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Moreover, a court-martial conviction for a violation of an Article of War which constituted a "neglect or disorder" did not subject the accused to imprisonment in a penitentiary. Articles of War, Article 97, 18 Stat. 1342 (1874); *Carter v. McClaghry*, 183 U.S. 365, 376 (1902). Hence the primary vehicle for collateral attack of any conviction, *habeas corpus*, was not available for those who had been convicted of a "neglect or disorder" by courts-martial. Federal jurisdiction is no longer dependent upon these common law rules. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

The only conclusion that can be drawn is that it is completely inappropriate to rely on a case over 115 years old in making a determination whether or not the present general article is unconstitutionally vague and overbroad. Not only have society and the Army radically changed during this time but so has the article itself and the law applicable to it. Indeed, the mercurial nature of the application of Article 134 is the quintessence of its constitutional infirmity.

One method by which Congress has attempted to achieve some modicum of notice concerning the meaning of Article 134 is the provision in Article 137 that, among other provisions, the punitive articles (i.e. Articles 77 through 134) "shall be carefully explained to each enlisted member at the time of his entrance on active duty, or

within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time when he reenlists." The crucial question arises as to what constitutes a "careful explanation" of Article 134. The Army, for example, devotes a total of only *twenty minutes* to an explanation of Articles 71-134 during the first six days of enlisted basic training. The re-explanation six months thereafter consists of a forty-nine minute period of instruction on these sixty-four punitive articles. The instructors need not be attorneys, nor do they seem to be provided with any regulatory guidance as to what constitutes a "careful explanation" of the statute.⁹ The problem is not merely that the training time is woefully short, but more importantly that a careful explanation would require an exposition of all of the case law and *Manual* provisions interpreting Article 134. Even if such a careful explanation were possible within a reasonable period of training, it would still not satisfy constitutional notice requirements, however, because of the open-ended nature of the Article. Thus, even Article 137, the statutory notice provision, is inadequate to transform Article 134 into a statute which gives fair warning of its proscription.

Based upon this analysis we submit that Article 134 is constitutionally infirm because it is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning. . . ." *Connally v. General Construction Co.*, *supra*, 269 U.S. at 391.

2. Article 134 fails to provide explicit enforcement standards.

The general article is vague not only because it fails to provide notice, but also because "men of common intel-

⁹ Army Regulation 350-212, "Training: Military Justice," 2 June 1972; Army Subject Schedule 21-10, "Military Justice (Enlisted Personnel)," 24 June 1969, Courses A and B.

ligence . . . differ as to its application." *Id.* As a concomitant to lack of fair warning to servicemen in general, the Article provides insufficient guidance to those who must enforce it. The standard here is whether the statute prevents arbitrary and discriminatory enforcement by providing "explicit standards for those who apply them." *Grayned v. City of Rockford*, *supra*, 408 U.S. at 108. In the military society, the ultimate "enforcer" of the Uniform Code of Military Justice is the commanding officer, at whatever level. Initially it is the "unit commander" who usually prefers charges and conducts the primary investigation by himself or through military policemen. *Manual*, paragraphs 29b and 32. Furthermore, it is a commander at some level who must determine what level of judicial or non-judicial action is to be taken. Articles 15-20 and 34(a), Uniform Code of Military Justice. Thus, the threshold question is whether Article 134, the *Manual*, or case law circumscribes adequate standards so that the commander will know when and how to apply the Article.¹⁰ For the reasons discussed *supra* at pages 6 through 18, the answer must be that there is insufficient guidance to prevent arbitrary and discriminatory enforcement. This conclusion is supported by the many occasions on which the military appellate courts have been required to decree that commanders' attempts to punish a variety of conduct under Article 134 were beyond the bounds of the statute.¹¹

10. As appellee Avrech points out (Brief at 58), the government fails to address this vital issue in its brief.

11. The following conduct has been held to be not within either of the first two clauses of Article 134:

Court of Military Appeals: Exposure of the genitals to a group of men in the commanding officer's office. *United States v. Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); usury. *United States v. Day*, 11 U.S.M.C.A. 549, 29 C.M.R. 365 (1960); negligent indecent exposure. *United States v. Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238

(Footnote continued on next page)

The requirement for providing ascertainable enforcement standards does not stop with the need for notice to the military commander. A statute may also be unconstitutionally vague if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsyl-*

(Footnote continued from previous page)

(1958); passenger in auto fleeing the scene of an accident, *United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956); negligent failure to maintain sufficient funds in a checking account, *United States v. Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1956); wrongfully refusing to testify before a Canadian coroner's inquest, *United States v. Siniger*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1956); misappropriation of a government vehicle, *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

Army Court of Military Review: Introduction of obscene pictures onto a federal reservation for personal use, *United States v. Schneider*, 27 C.M.R. 566 (ABR 1958); simple trespass, *United States v. Will*, 25 C.M.R. 674 (ABR 1958); occupying a hotel room with a female, *United States v. Walter*, 11 C.M.R. 355 (ABR 1953), *rev'd on other grounds*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954); possession of another's ration card, *United States v. Johnson*, 5 C.M.R. 268 (ABR 1952).

Air Force Court of Military Review: Sniffing glue, where no intoxication is alleged, *United States v. Menta*, 39 C.M.R. 956 (AFBR 1968); burning one's own home, *United States v. Freeman*, 15 C.M.R. 639 (AFBR 1954), *pet. denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954); wrongfully being in a WAF dayroom (accused male) at 3 A.M., *United States v. Smart*, 12 C.M.R. 825 (AFBR 1953); ejecting a member of one's household in the early morning hours where no duty to support is alleged, *United States v. Francis*, 12 C.M.R. 695 (AFBR 1953), *pet. denied*, 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953); having introduced a German female onto a military post, failing to remove her, *United States v. Hubbard*, 12 C.M.R. 492 (AFBR 1953); violation of foreign law, *United States v. Wolverton*, 10 C.M.R. 641 (AFBR 1953).

Coast Guard Court of Military Review: Removal of fuses from a fuse box, *United States v. Davis*, 27 C.M.R. 908 (CGBR 1958); possession of U.S. currency in the Philippines, *United States v. Rio Poon*, 26 C.M.R. 830 (CGBR 1958); possession of narcotics paraphernalia, *United States v. LeFort*, 15 C.M.R. 596 (CGBR 1954).

vania, 382 U.S. 399, 402-03 (1966). See also *Grayned v. City of Rockford*, *supra*. In trials by court-martial, the military jury must be instructed upon all of the elements of the offenses charged, including, in an Article 134 prosecution, whether the conduct charged is prejudicial to good order and discipline or service-discrediting. *Manual*, paragraphs 73a, 213d. By way of further definition, the instruction will invariably include the admonition that Article 134 does not contemplate "distant effects" but is limited to cases where the prejudice is "reasonably direct and palpable", and that conduct which is service-discrediting is that which "has a tendency to bring the service into disrepute or which tends to lower it in public esteem." Paragraphs 4-126, Department of the Army Pamphlet 27-9, "Military Judges' Guide", (1969). This "definition" suffers from the same vagueness as the statute and the *Manual*. Moreover, it requires a wholly subjective decision by military judges and court-martial members, each of whom will have his own concept of what type of conduct (if not every type), should be proscribed.

Appellants seem to suggest that the standard instructions assure that the prohibitions of Article 134 are concretized and thus prevent overbroad application. See Appellant's Brief in *Avrech* at 38. See also discussion, *infra*, at 23-24. To the contrary, these instructions illustrate the imprecision with which the statute may be applied at the whim of the commander, the military judge and the military jury. Even ascribing total good faith to all concerned, there is more than a fair risk that the prosecution for a given type of conduct will fall without the ambit of the statute. The military cases in this area¹² reflect the very real probability that those who enforce them will do so against conduct which

12. See note 11, *supra*.

is not illegal, due to the absence of sufficient standards or guidelines. *Gooding v. Wilson*, *Papachristou v. City of Jacksonville*, and *United States v. Reese*, *supra*.

It is insufficient to argue that appellate courts may eventually vindicate service members convicted improperly under Article 134; no one should be subjected to prosecution for conduct which is not illegal. Due process requires that the accused must be afforded adequate notice by the statute under which he is charged, not merely through its eventual interpretation years later by an appellate court. Article 134 does not provide that protection for the military accused, either at the time he is charged or at the time he is tried. Indeed, by submitting the question to the court members on decidedly vague instructions, the military practice gives fact-finders the unprecedented opportunity to make law through their findings of guilty. If executive legislation is prohibited, *United States v. McCormick*, *supra*, surely this Court will not sanction the establishment of a military common law of substantive crimes arrived at on an *ad hoc* basis by diverse court-martial juries.

Just as the soldier or sailor cannot reasonably determine what conduct is proscribed by Article 134, so the commander, military judge and court members are in the dark. The danger is that the latter group are charged with enforcing this statute to regulate the conduct of the former. This Court has never permitted the blind thus to lead the blind through the maze created by a vague penal statute. The strong constitutional policy against vagueness of this sort dictates a holding that Article 134 does not comport with the due process requirements of the Fifth Amendment because it does not give fair warning to the accused or his accuser. *Gooding v. Wilson*, *Papachristou v. City of Jacksonville*, *Coates v. City of Cincinnati*, *United States v. Cardiff*, and *Lanzetta v. New Jersey*, *supra*.

B. Article 134 is unconstitutionally overbroad.

Because it has the capacity for prohibiting a wide range of activities, both constitutionally protected and unprotected, Article 134 is unconstitutionally overbroad. We agree that the question of overbreadth is *usually* raised in the context of abridgement of First Amendment rights. (Appellant's Brief in *Avrech* at 35). However, the necessity for guarding against a "chilling effect" is not limited to the "free speech" area as appellant seems to urge. (*Id.* at 34-38). Thus, in *Coates v. City of Cincinnati*, *supra*, this Court reversed a conviction under a municipal ordinance which forbade "annoying conduct", because the statute *could* have encompassed both protected and unprotected conduct within the realm of freedom of assembly and association. *Id.*, 402 U.S. at 615. See also *Lanzetta v. New Jersey*, *supra*. Significantly, the Court in *Coates* did not look to the application of the statute to the conduct allegedly proscribed in that case:

... It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech. *Id.*, at 616.

Thus, appellant's attempt to narrow the issue here to the application of Article 134 to "disloyal statements" must fail. The issue is rather whether the statute is overly broad *on its face* because it "abut[s] upon sensitive areas of basic First Amendment freedoms". *Grayned v. City of Rockford*, *supra*, 408 U.S. at 109. The inquiry is not whether a "chilling effect" has actually occurred in the case at bar, but whether the challenged statute has an unconstitutional po-

tential for such an effect when viewed on its face. See *Gooding v. Wilson*, *Coates v. City of Cincinnati*, and *Dombrowski v. Pfister*, *supra*.

When viewed on its face, even considering the specific listing of possible offenses in the *Manual* the conclusion is inescapable: a statute which proscribes "any conduct" prejudicial to good order and discipline or service-discrediting, is so broad in sweep that it may very well reach conduct which is protected under the First Amendment. This Court need never reach the question of whether Levy and Avrech engaged in protected activities. Their convictions must fall on the threshold ground that the statute on its face may intrude upon constitutionally protected conduct or speech. *Coates v. City of Cincinnati*, and *Gooding v. Wilson*, *supra*.

C. No countervailing military necessity.

We recognize that due to the exigencies of military service, including the need for effective discipline and combat-readiness, the serviceman may not enjoy quite as broad a First Amendment freedom as do other citizens. However, the Court of Military Appeals has held that where these circumstances exist an abridgement of First Amendment freedoms may not be justified merely on the assertion that the military is "different". Rather, the special need of the military must be clearly demonstrated. *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).¹³ This *ad hoc* approach demonstrates the over-

13. The Court of Military Appeals has made clear that servicemen are entitled to the protections set forth in the Bill of Rights, particularly the guarantees of free speech and assembly contained in the First Amendment. *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972); *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). See Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 Notre Dame Lawyer 491 (1960).

broad sweep of Article 134, because those who contemplate certain action or speech are unable to determine whether their conduct will fall within the ambit of the statute. In this sense, the overbreadth of Article 134 is truly a symptom of its vagueness.

While the parties to these cases have well described the application of the general article to the offenses charged against Avrech and Levy, we submit that as a matter of sound policy this Court should not permit the statutes to stand due to their *facial* overbreadth. To hold otherwise would be to retreat unnecessarily from the standards of specificity and narrow drafting which this Court has required of statutes which have the potential for abutting upon the personal freedoms of the citizenry. *Gooding v. Wilson, supra*; *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Even considering the obvious need for order and discipline in the military setting, the statute as presently worded is too broad to comport with constitutional due process requirements.

D. The effect of unconstitutionality.

Obviously, because of the number of offenses charged in the past under this Article, a ruling by this Court that Article 134 is unconstitutional will have a sweeping effect on the military justice system.¹⁴ However, the military should be ready. The first warning came from this Court in

14. We will not address in detail the difficult problem of retroactivity or prospectivity. However, a sensible solution to the "floodgate of litigation" problem would be that adopted in *Levy* that application of the decision is "prospective only except as to those cases where (1) the issue was raised and preserved and (2) was pending in the military judicial system or pending in the federal court system on this date [footnote omitted]." *Id.*, 478 F.2d at 796.

O'Callahan v. Parker, 395 U.S. 258, 266 (1969) when Justice Douglas asked, in *dictum*, whether the "prejudicial conduct" provision in Article 134 satisfied civilian courts' standards of vagueness. Later in *Levy v. Parker*, 396 U.S. 1204-05 (1969) Justice Douglas, acting on appellee Levy's application for release pending appeal, noted that the Court in *O'Callahan* had "reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Then, in a speech presented in 1972, the Chief Judge of the U.S. Army Court of Military Review, a former Judge Advocate General, Major General Kenneth J. Hodson, recommended discarding Article 134 because its use could not be defended by the military in a modern society. Moreover, he predicted that this Article could not withstand the attack now made in this Court. Hodson, *Perspective, the Manual for Courts-Martial*, 1984, 47 Mil. L. Rev. 1 (1972).

General Hodson is not alone among respected authorities suggesting the abolition of the general article. In the *Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation Pursuant to the Uniform Code of Military Justice for the period January 1, 1972 to December 31, 1972*, it is acknowledged that "despite almost 200 years of constitutional history and precedent, [there is] no assurance that the Article will withstand further appellate examination. There is therefore a need for early congressional consideration of the problem." (*Id.* at 2). This sense of urgency is also reflected in the Report of the Department of Defense Task Force on the Administration of Military Justice in the Armed Forces (1972), which recommends codification of offenses currently tried under the first two clauses of Article 134 and expresses concern that the vagueness and breadth of Article 134 make it subject to abusive applica-

tion (Volume II at 79). See also Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259 (1971). But see Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968).

When the views of those who daily administer military justice are considered, it becomes clear that there is no justification for not codifying offenses now charged under Article 134 in order to provide fair warning, an ascertainable standard of enforcement, and statutes sufficiently narrow that they do not impinge upon constitutionally protected conduct or speech. We agree with the conclusion of Judge Aldisert in the *Levy* case:

... [T]here exist no countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values. 478 F.2d at 796.

For these reasons, Article 134 should be held unconstitutionally vague and overbroad.

POINT II

Article 133 is unconstitutional on its face.

Article 133 proscribes "conduct unbecoming an officer and a gentleman." We submit that on its face Article 133 suffers from the same unconstitutional vagueness and overbreadth as Article 134. Indeed, much of the discussion of the standards concerning Article 134 is pertinent here, and the arguments concerning fair warning, potential for arbitrary enforcement and overbreadth need not be repeated.

Even assuming that Congress may validly legislate against conduct which is "unbecoming", the question inherent on the face of Article 133 is what sort of conduct is unbecoming to an officer and a gentleman? Since the statutory language gives no answer we submit that *ipso facto* it fails to meet constitutional notice requirements. See *Lanzetta v. New Jersey*, *supra*. Nonetheless, appellant urges this Court to consider the content of the statute "by reference to the well-settled traditions and customs of the military." (Appellant's Brief in *Levy* at 40.) The argument runs that "to military officers, [Article 133] sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague." *Id.* This argument apparently is designed to meet the objection that those who administer the Article, as well as those who may be ensnared by its provisions, have a special degree of knowledge which fills the void left by the statute on its face. Where, then, does this knowledge come from?

The *Manual* offers little enlightenment. If an officer turns to paragraph 212 to determine whether to charge a fellow officer under the Article (or whether to engage in certain conduct himself) he is advised that:

... Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet or midshipman cannot fall without seriously compromising his standing as an officer, cadet or midshipman or his character as a gentleman. This article contemplates conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

If he desires further specificity about what will "compromise" either his official or personal moral standing, the officer is advised only that

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, indecency or indecorum, or of lawlessness, injustice or cruelty.

Finally, a catch-all sentence advises caution because the Article

includes acts made punishable by any other article provided these acts amount to conduct unbecoming an officer.

The *Manual* lists eight "instances" of violation, but obviously this list is merely illustrative, for the statute has been used to sweep many different types of conduct within its grasp.¹⁵

Being thus unsatisfied, the officer must then consider prior interpretations by military courts. Of course, as noted above with respect to Article 134, that inquiry will also be unsatisfactory because the statute may be used to proscribe conduct which has not theretofore been the subject of a reported decision.

Finally, the officer is urged to consider the "customs and traditions" of the military service, perhaps by reference to commercial publications such as *The Officer's Guide*.¹⁶ Resort to publications of this sort, and to an amorphous body of tradition places the officer in no better position than he was at the beginning of his inquiry: he is still unable to find a definition of what type of conduct is "unbecoming" to an "officer and a gentleman"; he is still unable to find a definition of what is a "gentleman." To urge reference to the moral codes of the past is to fail to

15. See generally, Note, *Taps for the Real Catch-22*, note 3 *supra*, at 1526-27.

16. Reynolds, *The Officer's Guide* (1969), which has been in copyrighted publication since 1930.

appreciate the plain fact that the armed services of the 1970s are *not* the armed services of the 1870s. Even if moral standards may be the subject of Congressional control, the standards must be updated to conform to the *modes* of the times. On this regard we note a seemingly self-defeating argument by appellant in *Levy*:

What is involved here is a system of values which has been part of the military experience for centuries. While these values are communicated to officers through military customs and usage, by example, they cannot be exhaustively codified without bringing the standard of conduct expected of officers "down to the requirements of a criminal code." (Appellant's Brief in *Levy* at 43).

That position demonstrates the very constitutional problem inherent in Article 133. It is part of a criminal code and yet purports to punish officers for failing to meet standards which somehow come to his knowledge by "example" from his predecessors through "military experience." While that approach may be satisfactory for exacting administrative penalties for improprieties (cf. *Letter Carriers, supra*), it is hardly sufficient to meet the requirements of specificity for conviction by court-martial, a federal criminal court. Contrary to appellant's position in *Levy*, the military services will not be precluded from holding officers to traditional high standards of conduct if Article 133 is struck down as vague (Brief at 43). Rather, the prohibition will be against imposing *criminal* penalties without sufficient notice of an ascertainable standard of criminal culpability. Indeed, if the traditions and customs of the service are as well-defined and relevant today as appellant claims (Brief in *Levy* at 44), the military should have little difficulty in drafting regulations or statutes which meet constitutional requirements of specificity.

As with the general article, Article 133 "leaves judges and jurors free to decide, without any legally fixed standard, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, *supra*, 382 U.S. at 402-03; *Grayned v. City of Rockford*, *supra*. Here the court members are instructed that as an element of proof they must determine that "under the circumstances the accused's conduct was unbecoming an officer and a gentleman." Further, the officer jurors are advised that "'unbecoming,' as used in this specification refers to behavior which is not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but *morally unbefitting and unworthy*." Paragraph 4-122, Department of the Army Pamphlet 27-9, *supra*. (Emphasis added.) See *Manual* paragraph 212. Thus, each court-martial member is left to his own devices to determine what "morally unbefitting and unworthy" conduct is. No further standard is offered in the jury instructions, which undoubtedly result in the type of *ad hoc* adjudication of guilt which this Court has found constitutionally unacceptable. *Gooding v. Wilson*, *Papachristou v. City of Jacksonville*, and *Lanzetta v. New Jersey*, *supra*.

An additional vice in the use of Article 133 in criminal prosecutions is that it is designed to be used as punishment for "acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." *Manual* paragraph 212. For example, in the *Levy* case, appellee was charged with violations of Article 133 and 134 for what was essentially the same conduct. Another example is found in paragraph 212 of the *Manual*: "a commissioned officer who steals property violates both this article and article 121." Is there a rational reason for this multiplication of charges? Presumably "ease of conviction" is the answer, because if the prosecution case suffers a failure of proof it might nonetheless establish

"conduct unbecoming" on facts which might not rise to the level necessary to establish commission of the substantive crime charged. However, "ease of conviction" is an unacceptable substitute for specificity in a criminal statute. See Note, *Taps for the Real Catch-22*, note 3 *supra*, at 1535. This potential for unreasonable multiplication of charges against an officer offends not only constitutional requirements of fairness; it seems as well to violate the provisions of Paragraph 26b of the *Manual* forbidding such pleading.

Finally, Article 133 suffers from the same facial overbreadth as does Article 134. Appellant's position (Brief in *Levy* at 44-47) notwithstanding, the constitutionality of the statute does not turn on whether Captain Levy's language may not have been protected speech under the circumstances. Rather, this Court's concern should be that the statute itself contains no real boundaries, and may very well cover conduct or speech which is protected by the First Amendment. See *Coates v. City of Cincinnati*, *supra*. Indeed, the very fact that it has been used in *Levy* as a sword against even unprotected conduct demonstrates its capability for use against speech that will ultimately be declared protected. See *United States v. Howe*, *supra*. The "chilling effect" here is obvious. If the military wishes to set boundaries of speech for its officers it should do so within constitutional limits to avoid encroachment into protected areas. This strict requirement in the First Amendment area is not met by the terms or application of Article 133. *Gooding v. Wilson*, *supra*.

We fully recognize the necessity for a high standard of conduct on the part of officers in our armed forces. Indeed, their example and leadership are often the means by which lives are saved in combat, and it is only through an effective officer corps that a military institution can function effectively. However, this valid policy require-

ment must be accomplished by communicating to our officers in clear statutory language what standards are expected. This is particularly so if officers are to be subjected to criminal penalties and a federal conviction for failing to comply with the standards. Thus, as a matter of sound judicial policy, Article 133 must be held violative of constitutional due process because on its face it is vague and overbroad.

CONCLUSION

For the foregoing reasons, the Association of the Bar of the City of New York, *Amicus Curiae*, respectfully urges this Court to affirm the judgment of the Court of Appeals in *Avrech*, and at least so much of the judgment of the Court of Appeals in *Lery* that holds Articles 133 and 134 unconstitutional.

Respectfully submitted,

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Dated: New York, New York
February 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL., APPELLANTS

v.

HOWARD B. LEVY

No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

**ON APPEALS FROM THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
AND THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REPLY MEMORANDUM FOR THE APPELLANTS

1. *Parker v. Levy*, No. 73-206.

1. The appellants in this case appealed the holding of the United States Court of Appeals for the Third Circuit that Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, were unconstitutional. On February 12, 1974, Levy filed a 126 page brief raising numerous procedural, evidentiary and constitutional issues which fall outside the issue pre-

sented in the appeal. While the issues raised by Levy may, in fact, constitute alternative arguments for the affirmance of the judgment below, they were never passed upon by the court of appeals.

We respectfully suggest that if this Court finds Articles 133 and 134 to be constitutional, the case should be remanded to the court of appeals for consideration of the alternative arguments raised by Levy. This procedure has been explained by the Court in *United States v. Ballard*, 322 U.S. 78, 88, as follows:

Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes v. Green*, 282 U.S. 531, 538—539; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 560, 567-568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. 257, 267-268; *Brown v. Fletcher*, 237 U.S. 583. If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals. Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved.

See also *Dandridge v. Williams*, 397 U.S. 471, 476, n. 6 ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court"); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468.

2. Levy argues that "[t]he Government * * * seems to concede that Dr. Levy was not convicted for making 'public' statements" (Appellee Br., No. 73-206, p. 47). The government has made no such concession; indeed the record shows that Levy was convicted of "publicly utter[ing]" disloyal statements. Levy's argument that he might have been convicted for private statements because "the law officer deleted this element from his charge" (Appellee Br., No. 73-206, p. 47) misunderstands both the law officer's charge and the court's findings. The law officer charged that to find Levy guilty the court must find "beyond a reasonable doubt" that, *inter alia*, the statements were "Publicly made" (R. 2594). He then said (*ibid.*):

If you are not convinced beyond a reasonable doubt that these statements, if any, were made in public, you may nevertheless find the accused guilty by excepting the words "in public" from your findings, provided, of course, you are convinced of his guilt beyond a reasonable doubt of the remaining elements.

The court returned a verdict of "Guilty," without excepting the words "in public" from its findings (R. 2617). It therefore found beyond a reasonable doubt that Levy was guilty, as charged in the specification, of "publicly utter[ing]" disloyal statements. See generally *Manual for Courts-Martial*, 1969 (Revised edition) Para. 74b.

II. *Secretary of the Navy v. Avrech*, No. 72-713.

1. Avrech argues that he may have been convicted of attempting to violate the second clause of Article 134 (prohibiting "all conduct of a nature to bring discredit upon the armed forces") because the specification did not in terms allege that his disloyal statements were "to the prejudice of good order and discipline," as provided in the first clause of the Article (Appellee Br., No. 72-1713, pp. 11, n.12, 12).¹ No records of the instructions given in *Avrech* exist today, so we cannot be sure that they did not include a reference to the second as well as the first clause. It seems clear, however, that Avrech was convicted of attempting to violate the first clause of Article 134.

In the first place the specification charged that Avrech attempted to publish his statements "to members of the Armed Forces of the United States * * * with design to promote disloyalty and disaffection among the troops" (App., No. 72-1713, p. 3). The convening authority in drafting the charge thus specifically avoided any mention of promoting disloyalty and disaffection among the "civilian populace," an alternative form of charge suggested in the model specification (see U.S. Br., No. 72-1713, p. 13a).

Avrech's attempted publication took place at Marble Mountain Air Facility, at Danang, in Vietnam, while he was on active duty in a combat zone. The intended recipients of his publication were, according to both the charge (*supra*) and Avrech's own testimony (Appellee Br., No. 72-1713, p. 5), other servicemen. Such conduct

¹We note that the specification against Levy did in terms charge that the disloyal statements were "to the prejudice of good order and discipline in the armed forces" (App., No. 73-206, p. 7).

does not fall within the service-discrediting clause, but rather is governed by the clause dealing with prejudice to good order and discipline. Thus in *United States v. Gray*, 20 U.S.C.M.A. 63, 67-68, 42 C.M.R. 255, 259-260, where the defendant was convicted of making a disloyal statement, the court made it clear that the service-discrediting provision did not apply: "Since the statement was published on a military reservation and only military persons were involved, the evidence must establish 'reasonably direct and palpable' prejudice to good order and discipline." This conclusion in *Gray* was based upon the holding of *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15. In *Snyder* the court held that enticing a woman in the service to engage in sexual intercourse violated the first clause of Article 134. The court said (1 U.S.C.M.A. at 425, 4 C.M.R. at 17): "[S]ince the alleged misconduct transpired in the semi-privacy of a military reservation, the second [service-discrediting] category need not detain us at length." See also, *United States v. Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272; *United States v. Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449.

2. Relying on *Stolte v. Laird*, 353 F. Supp. 1392 (D.D.C.), Avrech contends that the "disloyal statement specification is itself unconstitutionally vague and overly broad (Appellee Br., No. 72-1713 pp. 48-49, 53-63). In this connection Avrech asserts (Appellee Br., No. 72-1713, p. 48) that the Court of Military Appeals has "recently held that the requirement of 'direct and palpable' injury does not apply where a serviceman is charged with making disloyal statements." Contrary to this assertion, the military courts have continued to hold that the requirement of "direct and palpable" prejudice applies to disloyal statements, as well as all other offenses under the General Article. In *United*

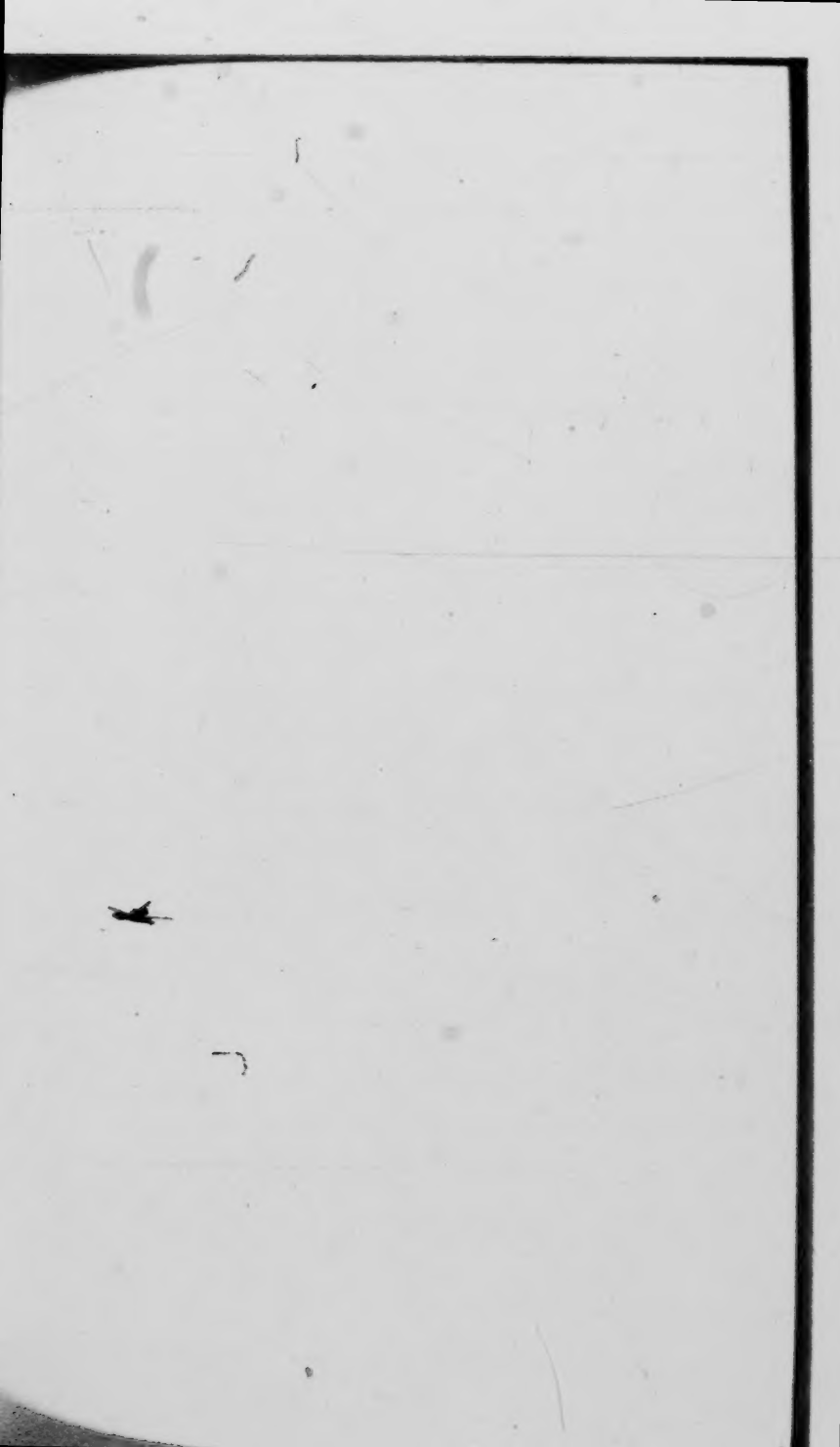
States v. Gray, supra, and *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 on which Avrech relies, the military court did not abandon the traditional requirements, but simply reaffirmed the rule that disloyal statements can directly and palpably prejudice good military order and discipline without successfully propagating disloyalty. *United States v. Batchelor*, U.S.C.M.A. 354, 22 C.M.R. 144. In accordance with these principles, the government must prove, *inter alia*, that the alleged statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops, and that such conduct was "directly and palpably" prejudicial to good order and discipline in the Armed Forces.²

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

February 1974

²In discussing the "disloyal statements" specification, Avrech suggests that the offense is a new one under the General Article, first added in the 1951 Manual (Appellee Br., No. 72-1713, pp. 25, 54). Such misconduct, however, has long been at the core of that Article's proscription. For example, Winthrop cites early cases construing the Article to forbid "[e]xpressing sentiments disloyal to government and in sympathy with the enemy." *Military Law and Precedents*, 728, n. 22 (2d ed. 1920).



1

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PARKER, WARDEN, ET AL. v. LEVY

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 73-206. Argued February 20, 1974—Decided June 19, 1974

Article 90 (2) of the Uniform Code of Military Justice (UCMJ) provides for punishment of any person subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer"; Art. 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman"; and Art. 134 (the "General Article") punishes any person subject to the Code for, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces," though not specifically mentioned in the Code. Appellee, an Army physician assigned to a hospital, was convicted by a general court-martial of violating Art. 90 (2) for disobeying the hospital commandant's order to establish a training program for Special Forces aide men, and of violating Arts. 133 and 134 for making public statements urging Negro enlisted men to refuse to obey orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children." After his conviction was sustained within the military and he exhausted this avenue of relief, appellee sought habeas corpus relief in the District Court, challenging his conviction on the ground that both Art. 133 and Art. 134 are "void for vagueness" under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment. The District Court denied relief, but the Court of Appeals reversed, holding that Arts. 133 and 134 are void for vagueness, that while appellee's conduct fell within an example of Art. 134 violations contained in the Manual for Courts-Martial, the possibility that the Articles would be applied to others' future conduct as to which there was insufficient warning, or which was within the area of protected First Amendment

Syllabus

expression, was enough to give appellee standing to challenge both Articles on their face, and that the joint consideration of the Art. 90 charges gave rise to a "reasonable possibility" that appellee's right to a fair trial was prejudiced, so that a new trial was required. *Held*:

1. Articles 133 and 134 are not unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Pp. 17-23.

(a) Each Article has been construed by the United States Court of Military Appeals or by other military authorities, such as the Manual for Courts-Martial, so as to limit its scope, thus narrowing the very broad reach of the literal language of the Articles, and at the same time supplying considerable specificity by way of examples of the conduct that they cover. Pp. 18-20.

(b) The Articles are not subject to being condemned for specifying no standard of conduct at all, but are of the type of statutes which "by their terms or as authoritatively construed apply without question as to certain activities, but whose application to other behavior is uncertain," *Smith v. Goguen*, 415 U. S. —, —. Pp. 20-21.

(c) Because of the factors differentiating military from civilian society, Congress is permitted to legislate with greater breadth and flexibility when prescribing rules for the former than when prescribing rules for the latter, and the proper standard of review for a vagueness challenge to UCMJ Articles is the standard that applies to criminal statutes regulating economic affairs, and that standard was met here, since appellee could have had no reasonable doubt that his statements urging Negro enlisted men not to go to Vietnam if ordered to do so was both "unbecoming an officer and gentleman" and "to the prejudice of good order and discipline in the armed forces," in violation of Arts. 133 and 134, respectively. Pp. 21-23.

2. Nor are Arts. 133 and 134 facially invalid because of overbreadth. Pp. 23-26.

(a) Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of the principles that while military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Pp. 23-24.

Syllabus

(b) There is a wide range of the conduct to which Arts. 133 and 134 may be applied without infringing the First Amendment, and while there may be marginal applications in which First Amendment values would be infringed, this is insufficient to invalidate either Article at appellee's behest. His conduct in publicly urging enlisted personnel to refuse to obey orders which might send them into combat was unprotected under the most expansive notions of the First Amendment, and Arts. 133 and 134 may constitutionally prohibit that conduct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth. Pp. 24-26.

3. Appellee's contention that even if Arts. 133 and 134 are constitutional, his conviction under Art. 90 should be invalidated because to carry out the hospital commandant's order would have constituted participation in a war crime and because the commandant gave the order, knowing it would be disobeyed, for the sole purpose of increasing appellee's punishment, is not of constitutional significance and is beyond the scope of review, since such defenses were resolved against appellee on a factual basis by the court-martial that convicted him. Pp. 26-27.

478 F. 2d 772, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring statement, in which BURGER, C. J., joined. DOUGLAS, J., filed a dissenting opinion. STEWART, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined. MARSHALL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy.	}	On Appeal from the United States Court of Appeals for the Third Circuit.
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[June 19, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Howard Levy, a physician, was a Captain in the Army stationed at Fort Jackson, South Carolina. He had entered the Army under the so-called "Berry Plan,"¹ under which he agreed to serve for two years in the armed forces if permitted first to complete his medical training. From the time he entered on active duty in July 1965 until his trial by court-martial, he was assigned as Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson. On June 2, 1967, appellee was convicted by a general court martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

The facts upon which his conviction rests are virtually undisputed. The evidence admitted at his court-martial trial showed that one of the functions of the hospital to which appellee was assigned was that of training Special Forces aid men. As Chief of the Dermatological Service, appellee was to conduct a clinic for those aid men. In

¹ See 50 U. S. C. § 454 (1970).

the late summer of 1966, it came to the attention of the hospital commander that the dermatology training of the students was unsatisfactory. After investigating the program and determining that appellee had totally neglected his duties, the commander called appellee to his office and personally handed him a written order to conduct the training. Appellee read the order, said that he understood it, but declared that he would not obey it because of his medical ethics. Appellee persisted in his refusal to obey the order, and later reviews of the program established that the training was still not being carried out.

During the same period of time, appellee made several public statements to enlisted personnel at the post, of which the following is representative:

"The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murders of women and children."

Appellee's military superiors originally contemplated nonjudicial proceedings against him under Art. 15 of the Uniform Code of Military Justice, 10 U. S. C. § 815 (1970), but later determined that court-martial proceedings were appropriate. The specification under Art. 90

alleged that appellee willfully disobeyed the hospital commandant's order to establish the training program, in violation of that article, which punishes anyone subject to the Uniform Code of Military Justice who "willfully disobeys a lawful command of his superior commissioned officer."² Statements to enlisted personnel were listed as specifications under the charges of violating Art. 133 and Art. 134 of the Code. Article 133 provides for the punishment of "conduct unbecoming an officer and a gentleman,"³ while Art. 134 proscribes, *inter alia*, "all disorders and neglect to the prejudice of good order and discipline in the armed forces."⁴

² Article 90 of the Uniform Code of Military Justice, 10 U. S. C. 890 (1970), provides:

"Any person subject to this chapter who—

"(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

"(2) willfully disobeys a lawful command of his superior commissioned officer;

"shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

³ Article 133 of the Uniform Code of Military Justice, 10 U. S. C. 933 (1970), provides:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

⁴ Article 134 of the Uniform Code of Military Justice, 10 U. S. C. 934 (1970), provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The specification under Art. 134 alleged that appellee "did in Fort Jackson, South Carolina, . . . with design to promote disloyalty and disaffection among the troops, publicly utter 'certain statements to divers enlisted personnel at divers times'" The specification under Art. 134 alleged that appellee did "while in the performance of his duties at the United States Army Hospital . . . wrongfully and dishonorably" make statements variously described as intemperate, defamatory, provoking, disloyal, contemptuous and disrespectful to Special Forces personnel and to enlisted personnel who were patients or under his supervision.*

* The specification under Art. 134 (Charge II) alleged in full:

"Captain Howard B. Levy, U. S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times:

'The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces."

* The specification under Art. 133 (Additional Charge I) alleged that appellee

"did . . . at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of

Appellee was convicted by the court martial, and his conviction was sustained on his appeals within the military.⁷ After he had exhausted this avenue of relief, he

the persons as hereinafter more particularly described, to wit:

(1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: 'I will not train special forces personnel because they are "liars and thieves," "killers of peasants," and "murderers of women and children,"' or words to that effect;

(2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: 'I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight,' or words to that effect;

(3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: 'The Hospital Commander has given me an order to train special forces personnel, which order I have refused and "will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: 'I hope when you get to Vietnam something happens to you and you are injured,' or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army."

⁷ *United States v. Levy*, C. M. 416, 463, 39 C. M. R. 672 (1968), petition for review denied, No. 21, 641, 18 U. S. C. M. A. 627 (1969). Appellee also unsuccessfully sought relief in the civilian courts. *Levy v. Corcoran*, 389 F. 2d 929 (D. C. Cir.), application for stay

sought federal habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging his court-martial conviction on a number of grounds. The District Court, on the basis of the voluminous record of the military proceedings and the argument of counsel, denied relief. It held that the "various Articles of the Uniform Code of Military Justice are not unconstitutional for vagueness," citing several decisions of the United States Court of Military Appeals.⁸ The court rejected the balance of appellee's claims without addressing them individually, noting that the military tribunals had given fair consideration to them and that the role of the federal courts in reviewing court-martial proceedings was a limited one.

The Court of Appeals reversed, holding in a lengthy opinion that Arts. 133 and 134 are void for vagueness. *Parker v. Levy*, 478 F. 2d 772 (CA3 1973). The court found little difficulty in concluding that "as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians," the General Articles "do not pass constitutional muster." It relied on such cases as *Grayned v. City of Rockford*, 408 U. S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U. S. 156 (1971); *Giaccio v. Pennsylvania*, 382 U. S. 399 (1969); *Coates v. City of Cincinnati*, 402 U. S. 611 (1971), and *Gelling v. Texas*, 343 U. S. 960 (1952).

denied, 387 U. S. 915, cert. denied, 389 U. S. 960 (1967); *Levy v. Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399 (1967); *Levy v. Resor*, Civ. No. 67-442 (D. S. C. July 5, 1967), aff'd *per curiam*, 384 F. 2d 689 (CA4 1967), cert. denied, 389 U. S. 1049 (1968); *Levy v. Dillon*, 286 F. Supp. 593 (Kan. 1968), aff'd, 415 F. 2d 1263 (CA10 1969).

⁸ *United States v. Howe*, 17 U. S. C. M. A. 165, 37 C. M. R. 429 (1967); *United States v. Sandinsky*, 14 U. S. C. M. A. 563, 34 C. M. R. 343 (1964); *United States v. Frantz*, 2 U. S. C. M. A. 161, 7 C. M. R. 37 (1953).

The Court of Appeals did not rule that appellee was punished for doing things he could not reasonably have known constituted conduct proscribed by Arts. 133 or 134. Indeed, it recognized that his conduct fell within one of the examples of Art. 134 violations contained in the Manual for Courts-Martial, promulgated by the President by Executive order.⁹ Nonetheless, relying chiefly on *Gooding v. Wilson*, 405 U. S. 518 (1972), the Court found the possibility that Arts. 133 and 134 would be applied to future conduct of others as to which there was insufficient warning, or which was within the area of protected First Amendment expression, enough to give appellee standing to challenge both articles on their face. While it acknowledged that different standards might in some circumstances be applicable in considering vagueness challenges to provisions which govern the conduct of members of the armed forces, the Court saw in the case of Arts. 133 and 134 no "countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values." Turning finally to appellee's conviction under Art. 90, the Court held that the joint consideration of Art. 90 charges with the charges under Arts. 133 and 134 gave rise to a "reasonable possibility" that appellee's right to a fair trial was prejudiced, so that a new trial was required.

Appellants appealed to this Court pursuant to 28 U. S. C. § 1252 (1970). We set the case for oral argument, and postponed consideration of the question of our jurisdiction to the hearing on the merits. 414 U. S. 973 (1973).¹⁰

⁹ Manual for Courts-Martial ¶ 213f (5) (1969).

¹⁰ Section 1252 provides in pertinent part that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . .

I

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has,

holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. . . ." In his motion to dismiss or affirm, appellee urged a lack of jurisdiction in this Court because the attorneys who filed and served the notice of appeal were not attorneys of record and because the attorney effecting service failed to comply with Rule 33.3 (c) of this Court requiring persons not admitted to the Bar of this Court to prove service by affidavit, rather than by certificate. Appellee alternatively contended that 28 U. S. C. § 1252 was not intended to permit appeals from the courts of appeals, but only from the district courts. We postponed consideration of the jurisdictional question to the hearing on the merits. Appellee now renews his contentions that the asserted defects in appellants' filing of their notice of appeal should be treated as a failure to file a timely notice of appeal, and that the appeal must accordingly be dismissed. See, e. g., *Territo v. United States*, 358 U. S. 279 (1959); *Department of Banking v. Pink*, 317 U. S. 264, 268 (1942). He also urges that the question whether an appeal may be taken to this Court from the Court of Appeals under 28 U. S. C. 1252 presents a question of first impression.

We hold that "any court of the United States," as used in § 1252, includes the courts of appeals. The Reviser's Note for § 1252 states that the "term 'any court of the United States' includes the courts of appeals" The definitional section of Title 28, 28 U. S. C. § 451 (1970), provides: "As used in this title: The term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts" Our reading of § 1252 is further supported by that section's legislative history. Section 1252 was originally enacted as § 2 of the Act of August 24, 1937, 50 Stat. 751. Section 5 of that same Act defined "any court of the United States" to include any "circuit court of appeals." We also find no merit in appellee's contention that the asserted defects in appellants' notice of appeal deprive this Court of jurisdiction. As appellants note, appellee makes no claim that he did not have actual notice of the filing of the notice of appeal. Assuming that

again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles*, 350 U. S. 11, 17 (1955). In *In re Grimley*, 137 U. S. 147, 153 (1890), the Court observed: "An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U. S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty" *Burns v. Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the armed forces:

"The . . . President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to a specified rank during the pleasure of the President." *Orloff v. Willoughby*, *supra*, 345 U. S., at 91.

Just as military society has been a society apart from civilian society, so "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, *supra*, 346 U. S., at 140. And to maintain the

there was technical noncompliance with Rule 33 of this Court for the reasons urged by appellee, that noncompliance does not deprive this Court of jurisdiction. Cf. *Taglianetti v. United States*, 394 U. S. 316, n. 1 (1969); *Heflin v. United States*, 358 U. S. 415, 418 n. 7 (1959).

discipline essential to perform its mission effectively, the military has developed what "may not unfitly be called the customary military law" or "general usage of the military service." *Martin v. Mott*, 12 Wheat. 19, 35 (1827). As the opinion in *Martin v. Mott* demonstrates, the Court has approved the enforcement of those military customs and usages by courts-martial from the early days of this Nation:

"Courts Martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon any other principle, Courts Martial would be left without any adequate means to exercise the authority confided to them: for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them" *Id.*, at 35-36.

An examination of the British antecedents of our military law shows that the military law of Britain had long contained the forbears of Arts. 133 and 134 in remarkably similar language. The Articles of the Earl of Essex (1642) provided that "[a]ll other faults, disorders and offenses, not mentioned in these Articles, shall be punished according to the general customs and laws of war." One of the British Articles of War of 1765 made punishable "all Disorders or Neglects . . . to the Prejudice of Good Order and Military Discipline . . ." that were not mentioned in the other articles.¹¹ Another of those articles provided:

"Whatsoever Commissioned Officer shall be convicted before a General Court-martial, of behaving in a scandalous, infamous Manner, such as is unbe-

¹¹ Section XX, Art. III of the British Articles of War of 1765. Winthrop's *Military Law and Precedents* 946 (2d ed. 1920).

coming the Character of an Officer and a Gentleman, shall be discharged from Our Service." ¹²

In 1775 the Continental Congress adopted this last article, along with 68 others for the governance of its army.¹³ The following year it was resolved by the Congress that "the committee on spies be directed to revise the rules and articles of war; this being a committee of five, consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston. . . ." ¹⁴ The article was included in the new set of articles prepared by the Committee, which Congress adopted on September 20, 1776.¹⁵ After being once more reenacted without change in text in 1786, it was revised and expanded in 1806, omitting the terms "scandalous" and "infamous," so as to read:

"[a]ny commissioned officer convicted before a general court martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service." ¹⁶

From 1806, it remained basically unchanged through numerous congressional reenactments until it was enacted as Art. 133 of the Uniform Code of Military Justice in 1951.

The British article punishing "all Disorders and Neglects . . ." was also adopted by the Continental Congress

¹² Section XV, Art. XXIII, of the British Articles of War of 1765. *Id.*, at 945.

¹³ Article XLVII of the American Articles of War of 1775. *Id.*, at 957.

¹⁴ *Id.*, at 22.

¹⁵ Article 21 of Section XIV of the American Articles of War of 1776. *Id.*, at 969.

¹⁶ Article 83 of Section 1 of the American Articles of War of 1806. *Id.*, at 983.

in 1775 and reenacted in 1776.¹⁷ Except for a revision in 1916, which added the clause punishing "all conduct of a nature to bring discredit upon the military service,"¹⁸ substantially the same language was preserved throughout the various reenactments of this Article too, until in 1951 it was enacted as Art. 134 of the Uniform Code of Military Justice.

Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134. In *Dynes v. Hoover*, 61 U. S. (20 How.), 65 (1857), this Court upheld the Navy's General Article, which provided that "[a]ll crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The Court reasoned:

"[W]hen offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of

¹⁷ Article 1 of the American Articles of War of 1775, Article 5 of section XVIII of the American Articles of War of 1776. *Id.*, at 957, 971.

¹⁸ Act of August 29, 1916, c. 418, 39 Stat. 619, 650.

courts martial and the offences of which the different courts martial have cognizance." *Id.*, at 82.

In *Smith v. Whitney*, 116 U. S. 167 (1886), this Court refused to issue a writ of prohibition against Smith's court-martial trial on charges of "[s]candalous conduct tending to the destruction of good morals" and "culpable inefficiency in the performance of duty." The Court again recognized the role of "the usages and customs of war" and "old practice in the army" in the interpretation of military law by military tribunals. *Id.*, at 178-179.

In *United States v. Fletcher*, 148 U. S. 84 (1893), the Court considered a court-martial conviction under what is now Art. 133, rejecting Captain Fletcher's claim that the court-martial could not properly have held that his refusal to pay a just debt was "conduct unbecoming an officer and a gentleman." The Court of Claims decision which the Court affirmed in *Fletcher* stressed the military's "higher code termed honor, which holds its society to stricter accountability"¹⁹ and with which those trained only in civilian law are unfamiliar. In *Swaim v. United States*, 165 U. S. 553 (1897), the Court affirmed another Court of Claims decision, this time refusing to disturb a court-martial conviction for "conduct to the prejudice of good order and military discipline in violation of the articles of war." The Court recognized the role of "unwritten law or usage" in giving meaning to the language of what is now Art. 134. In rejecting Swaim's argument that the evidence failed to establish an offense under the article, the Court said:

"[T]his is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed

¹⁹ *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (1891).

by the civil courts. As was said in *Smith v. Whitney*, 116 U. S. 178, 'of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.' " *Id.*, at 561.

The Court of Claims had observed that cases involving "conduct to the prejudice of good order and military discipline," as opposed to conduct unbecoming an officer, "are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, but must be gauged by an actual knowledge and experience of military life, its usages and duties." ²⁰

II

The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 im-

²⁰ *Swaime v. United States*, 28 Ct. Cl. 173, 228 (1893).

poses such a sanction on a commissioned officer. The Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties: disrespect towards superior commissioned officers, 10 U. S. C. § 889 (1970); cruelty towards, or oppression or maltreatment of subordinates, 10 U. S. C. § 893 (1970); negligent damaging, destruction, or wrongful disposition of military property of the United States, 10 U. S. C. § 908 (1970); improper hazarding of a vessel, 10 U. S. C. § 910 (1970); drunkenness on duty, 10 U. S. C. § 912 (1970); and malingering, 10 U. S. C. § 910 (1970).

But the other side of the coin is that the penalties provided in the Code vary from death and substantial penal confinement at one extreme to forms of administrative discipline which are below the threshold of what would normally be considered a criminal sanction at the other. Though all of the offenses described in the Code are punishable "as a court martial may direct," and the accused may demand a trial by court-martial,²¹ Art. 15 of the Code also provides for the imposition of nonjudicial "disciplinary punishments" for minor offenses without the intervention of a court-martial. 10 U. S. C. § 815 (1973 Supp.). The punishments imposable under that Article are of a limited nature. With respect to officers, punishment may encompass suspension of duty, arrest in quarters for not more than 30 days, restriction for not more than 60 days, and forfeiture of pay for a limited period of time. In the case of enlisted men, such punishment may additionally include, among other things, reduction to the next inferior pay grade, extra fatigue duty, and correctional custody for not more than seven consecutive days. Thus while legal proceedings actually brought before a court-martial are prosecuted in the name of the

²¹ 10 U. S. C. § 815 (a) (1973 Supp.).

Government, and the accused has the right to demand that he be proceeded against in this manner before any sanctions may be imposed upon him, a range of minor sanctions for lesser infractions are often imposed administratively. Forfeiture of pay, reduction in rank, and even dismissal from the service bring to mind the law of labor-management relations as much as the civilian criminal law.

In short, the Uniform Code of Military Justice regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians; but at the same time the enforcement of that code in the area of minor offenses is often by sanctions which are more akin to administrative or civil sanctions than to civilian criminal ones.

The availability of these lesser sanctions is not surprising in view of the different relationship of the Government to members of the military. It is not only that of law giver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner and law giver rolled into one. That relationship also reflects the different purposes of the two communities. As we observed in *In re Grimley, supra*, 137 U. S., at 153, the military "is an executive arm" whose "law is that of obedience." While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian commander-in-chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.

Perhaps because of the broader sweep of the Uniform Code, the military makes an effort to advise its per-

sonnel of the contents of the Uniform Code, rather than depending on the ancient doctrine that everyone is presumed to know the law. Article 137 of the Uniform Code of Military Justice, 10 U. S. C. § 937 (1970), requires that the provisions of the Code be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter" and that they be "explained again after he has completed six months of active duty, . . ." Thus the numerically largest component of the services, the enlisted personnel, who might be expected to be a good deal less familiar with the Uniform Code than commissioned officers, are required by its terms to receive instructions in its provisions. Article 137 further provides that a complete text of the Code and of the regulations prescribed by the President "shall be made available to any person on active duty, upon his request, for his personal examination."

With these very significant differences between military law and civilian law and between the military community and the civilian community in mind, we turn to appellee's challenges to the constitutionality of Arts. 133 and 134.

III

Appellee urges that both Arts. 133 and 134 ("the General Article") are "void for vagueness" under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment. We have recently said of the vagueness doctrine:

"The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by narrowing state court in-

terpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, Slip Opinion, pp. 6-7.

Each of these Articles has been construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.

The United States Court of Military Appeals has stated that Art. 134 must be judged "... not in *vacuo*, but in the context in which the years have placed it," *United States v. Frantz*, 2 U. S. C. M. A. 161, 163, 7 C. M. R. 37, 38 (1953). Article 134 does not make "every irregular, mischievous, or improper act a court-martial offense," *United States v. Sadinsky*, 14 U. S. C. M. A. 563, 565, 34 C. M. R. §§ 343, 345 (1964), but its reach is limited to conduct that is "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *Ibid.*; *United States v. Holiday*, 4 U. S. C. M. A. 454, 456, 16 C. M. R. 28, 30 (1954). It applies only to calls for active opposition to the military policy of the United States, *United States v. Priest*, 21 U. S. C. M. A. 564, 45 C. M. R. 338 (1972), and does not reach all [d]isagreement with, or objection to, a policy of the government." *United States v. Harvey*, 19 U. S. C. M. A. 539, 544, 42 C. M. R. 100 (1971).

The Manual for Courts-Martial restates these limitations on the scope of Art. 134.²² It goes on to say that "[c]ertain disloyal statements by military personnel" may be punishable under Art. 134. "Examples are utterances designed to promote disloyalty and disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of govern-

²² Manual, *supra*, ¶ 213c, at 28-72.

ment."²³ Extensive additional interpretative materials are contained in the portions of the Manual devoted to Art. 134, which describe more than sixty illustrative offenses.

The Court of Military Appeals has likewise limited the scope of Art. 133. Quoting from Winthrop's Military Law and Precedents, *supra*, at 711-712, that court has stated:

"... to constitute therefore the conduct here denounced, the act which forms the basis for the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be such a nature or committed under circumstances as to bring dishonor or disrepute among the military profession which you represent.'" *United States v. Howe*, 17 U. S. C. M. A. 165, 177-178, 37 C. M. R. 429, 435 (1967).

The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the Articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. It would be idle to pretend that there are not areas within the general confines of the Articles' language which have been left vague despite these narrowing constructions. But even though sizable areas of uncertainty as to the coverage of the Articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by

²³ *Id.*, ¶ 213f (5), at 28-77.

less formalized custom and usage. *Dynes v. Hoover, supra*. And there also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both Articles clearly apply without vagueness or imprecision. It is within that range that appellee's conduct squarely falls, as the Court of Appeals recognized:

"Neither are we unmindful that the *Manual for Courts-Martial* offers an example of an offense under Article 134, 'praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' With the possible exception of the statement that 'Special Forces personnel are liars and thieves, killers of peasants and murders of women and children,' it would appear that each statement for which [Levy] was court-martialed could fall within the examples given in the *Manual*."

The Court of Appeals went on to hold, however, that even though Levy's own conduct was clearly prohibited, the void for vagueness doctrine conferred standing upon him to challenge the imprecision of the language of the Articles as they might be applied to hypothetical situations outside the considerable area within which their applicability was similarly clear.

We disagree with the Court of Appeals both in its approach to this question and in its resolution of it. This Court has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendments because they contained no standard whatever by which criminality could be ascertained, and the doctrine of these cases has subsequently acquired the shorthand description of "void for vagueness." *Lanzetta v. New Jersey*, 306 U. S. 451 (1939); *Winters v. New York*, 333 U. S. 507 (1948). In these cases, the criminal provision is vague "not in the sense

that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971).

But the Court of Appeals found in this case, and we agree, that Arts. 133 and 134 are subject to no such sweeping condemnation. Levy had fair notice from the language of each Article that the particular conduct which he engaged in was punishable. This is a case, then, of the type adverted to in *Smith v. Goguen, supra*, in which the statutes "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." *Smith v. Goguen, supra*, p. 11. The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these Articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court.

We have noted in *Smith v. Goguen, supra*, slip opinion, p. 7, that more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression. For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. But each of these differentiations relate to how strict a test of vagueness shall be applied in judging a particular criminal statute. None of them suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to

attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the Articles of the U. C. M. J. is the standard which applies to criminal statutes regulating economic affairs. Clearly, that standard is met here, for as the Court stated in *United States v. National Dairy Corp.*, 372 U. S. 29, 32-33 (1963):

"The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E. g.*, *Jordan v. De George*, 341 U. S. 223, 231 (1951), and *United States v. Petrillo*, 332 U. S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E. g.*, *United States v. Rumely*, 345 U. S. 41, 47 (1953); *Crowell v. Benson*, 285 U. S. 22, 62 (1932); see *Screws v. United States*, 325 U. S. 91 (1945).

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harriss*, 347 U. S. 612, 617 (1954). In determining the sufficiency of the notice the statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson v. United States*, 324 U. S. 282 (1945)."

Since appellee could have had no reasonable doubt that his published statements urging Negro enlisted men not to go to Vietnam if ordered to do so was both "unbecoming an officer and a gentleman," and "to the prejudice of good order and discipline in the armed forces," in violation of the provisions of Art. 133 and Art. 134, respectively, his challenge to them as unconstitutionally vague under the Due Process Clause of the Fifth Amendment must fail.

We likewise reject appellee's contention that Arts. 133 and 134 are facially invalid because of their "overbreadth." In *Gooding v. Wilson*, 405 U. S. 518, 520-521 (1972), the Court said:

"It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' *Dombrowski v. Pfister*, 380 U. S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity'"

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military

that which would be constitutionally impermissible outside it. Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of these principles. The United States Court of Military Appeals has sensibly expounded the reason for this different application of First Amendment doctrines in its opinion in *United States v. Priest*, *supra*, 21 U. S. C. M. A., at 570, 35 C. M. R., at 42 (1972):

"In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg v. Ohio*, *supra* [395 U. S. 444]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States v. Gray*, *supra* [20 U. S. C. M. A. 63]."

In *Broadrick v. Oklahoma*, 413 U. S. 601, 610 (1973), we said that "[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." We

further commented in that case that "[i]n the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.'" *Id.*, at 611. One of those exceptions "has been carved out in the area of the First Amendment." *Ibid.* In the First Amendment context attacks have been permitted "on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity," *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965).

This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . ." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548, 580-581 (1973). And the Court recognized in *Broadrick*, *supra*, that "where conduct and not merely speech is involved" the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U. S., at 615. Here, as the Manual makes clear, both Art. 133 and Art. 134 do prohibit a "whole range of easily identifiable and constitutionally proscribable . . . conduct."

Both *Broadrick* and *Letter Carriers* involved basically noncriminal sanctions imposed on federal and state employees who were otherwise civilians. The Uniform Code of Military Justice applies a series of sanctions, varying from severe criminal penalties to administratively imposed minor sanctions, upon members of the military. However, for the reasons dictating a different

application of First Amendment principles in the military context described above, we think that the "weighty countervailing policies" *Broadrick, supra*, which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context.

There is a wide range of the conduct of military personnel to which the Arts. 133 and 134 may be applied without infringement of the First Amendment. While there may lurk at the fringes of the Articles, even in the light of their narrowing construction by the United States Court of Military Appeals, some possibility that conduct which would be ultimately held to be protected by First Amendment could be included within their prohibition, we deem this insufficient to invalidate either of them at the behest of appellee. His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment. Articles 133 and 134 may constitutionally prohibit that conduct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth.

IV

Appellee urges that should we disagree with the Court of Appeals as to the constitutionality of Arts. 133 and 134, we should nonetheless affirm its judgment by invalidating his conviction under Art. 90. He contends that to carry out the hospital commandant's order to train aide men in dermatology would have constituted participation in a war crime, and that the commandant gave the order in question, knowing that it would be disobeyed, for the sole purpose of increasing the punishment which could be imposed upon appellee. The Court of Appeals observed that each of these defenses was recog-

nized under the Uniform Code of Military Justice, but had been resolved against appellee on a factual basis by the court-martial which convicted him. The court went on to say that:

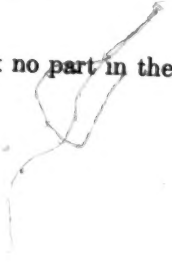
"In isolation, these factual determinations adverse to appellant under an admittedly valid Article are not of constitutional significance and resultedly, are beyond our scope of review." See *Welchel v. McDonald*, 340 U. S. 122 (1950).

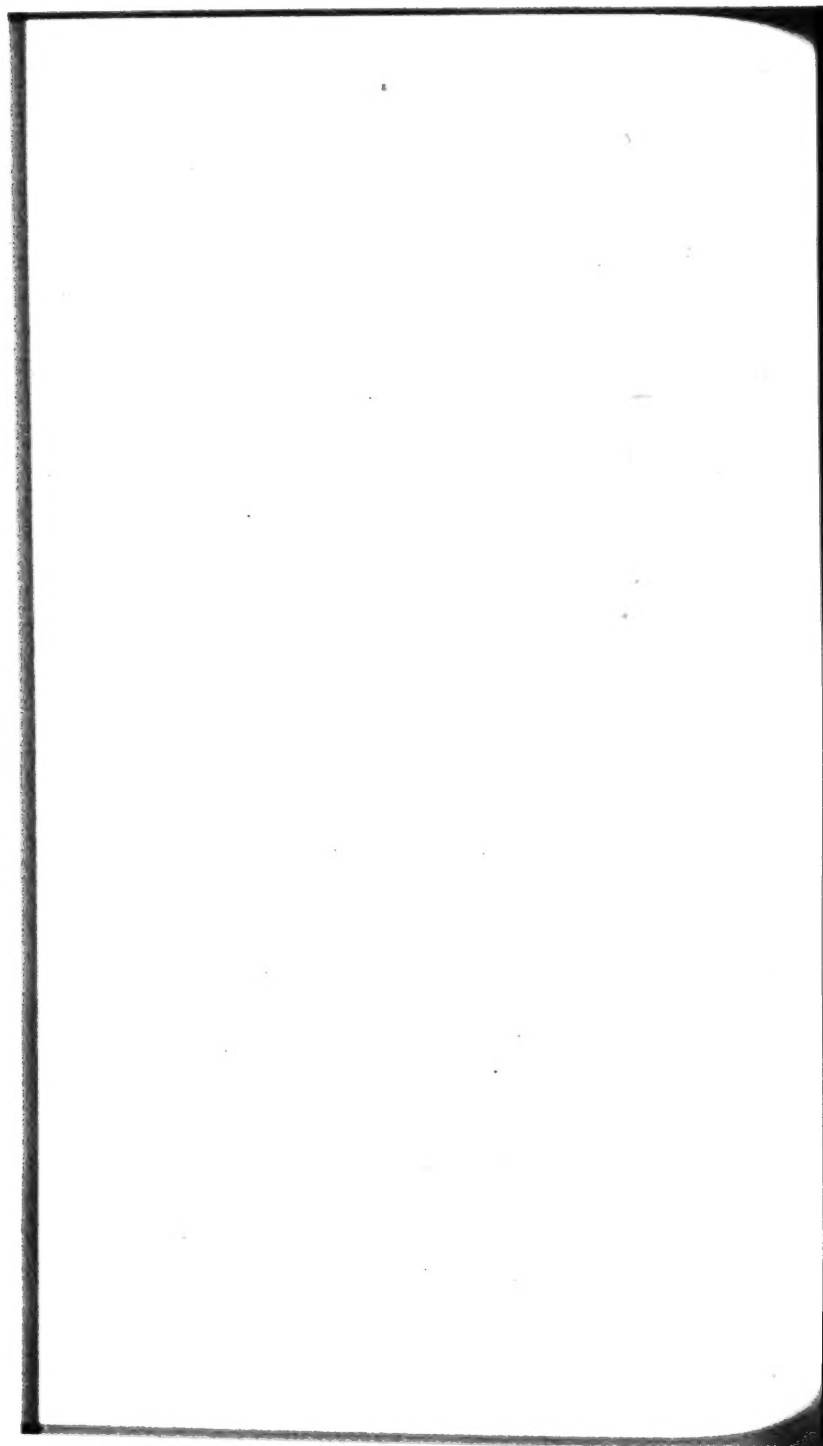
We agree with the Court of Appeals.

Appellee in his brief here mounts a number of alternative attacks on the sentence imposed by the court-martial, attacks which were not treated by the Court of Appeals in its opinion in this case. To the extent that these points were properly presented to the District Court and preserved on appeal to the Court of Appeals, and to the extent that they are open on federal habeas corpus review of court-martial convictions under *Burns v. Wilson*, 346 U. S. 17 (1953), we believe they should be addressed by the Court of Appeals in the first instance.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.





SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy.	}	On Appeal from the United States Court of Appeals for the Third Circuit.
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[June 19, 1974]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins.

I wholly concur in the Court's opinion. I write only to state what for me is a crucial difference between the majority and dissenting views in this case. My Brother STEWART complains that men of common intelligence must necessarily speculate as to what "conduct unbecoming an officer and a gentleman" or conduct to the "prejudice of good order and discipline in the armed forces" or conduct "of a nature to bring discredit upon the armed forces" really mean. He implies that the average soldier or sailor would not reasonably expect, under the General Articles, to suffer military reprimand or punishment for engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers. *Ante*, p. 6. He argues that "times have changed" and that the Articles are "so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them." *Ante*, pp. 9, 15.

These assertions are, of course, no less judicial fantasy than that which the dissent charges the majority of indulging. In actuality, what is at issue here are concepts of "right" and "wrong" and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a

broadest variety of relationships than one finds in civilian life.

In my judgment, times have not changed in the area of moral precepts. Fundamental concepts of right and wrong are the same now as they were under the Articles of the Earl of Essex (1642), or the British Articles of War of 1765, or the American Articles of War of 1775, or during the long line of precedents of this and other courts upholding the General Articles. And, however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force.

A noted commentator, Professor Bishop of Yale, has recently stated that "[a]lmost all of the acts actually charged under [Articles 133 and 134], notably drug offenses, are of a sort which ordinarily soldiers know, or should know, to be punishable." J. Bishop, *Justice Under Fire* 87-88 (1974). I agree. The subtle airs that govern the command relationship are not always capable of specification. The General Articles are essential not only to punish patently criminal conduct, but also to foster an orderly and dutiful fighting force. One need only read the history of the permissive—and short-lived—regime of the Soviet Army in the early days of the Russian Revolution to know that command indulgence of an undisciplined rank and file can decimate a fighting force. Moreover, the fearful spectre of arbitrary enforcement of the Articles, the engine of the dissent, is disabled, in my view, by the elaborate system of military justice that Congress has provided to servicemen, and by the self-evident, and self-selective, factor that commanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.

In *Fletcher v. United States*, 28 Ct. Cl. 173 (1893), the Court of Claims reviewed a court-martial finding that a Captain Fletcher was guilty of conduct unbecoming an

officer in having, "with intent to defraud, failed, neglected, and refused to pay [one W.] the amount due him, though repeatedly requested to do so." The court found this charged offense to come within the Article. The sentiments expressed by Judge Nott, writing for the court in that case, are just as applicable to the case we decide today.

"It must be confessed that, in the affairs of civil life and under the rules and principles of municipal law, what we ordinarily know as fraud relates to the obtaining of a man's money, and not to refusing to pay it back. It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, 'His moral horizon was limited by the civil code of Tennessee.' That it is a fraud to obtain a man's money by dishonest representations, but not a fraud to keep it afterwards by any amount of lying and deceit, is a distinction of statutory tracing. The gambler who throws away other people's money and the spendthrift who uses it in luxurious living instead of paying it back, cheat and defraud their creditors as effectually as the knaves and sharpers who drift within the meshes of the criminal law. We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum*; but unhappily in the affairs of real life we find that

there are many things which are *malum in se* without likewise being *malum prohibitum*. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." 26 Ct. Cl., at 562-563.

Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal. The truth is that the moral horizons of the American people are not footloose, or limited solely by "the civil code of Tennessee." The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right.*

*My Brother DOUGLAS' rendition of Captain Levy's offense in this case would leave one to believe that Levy was punished for speaking against the Vietnam War at an Army wives' tea party. In fact, Levy was convicted under charges that he, while in the performance of his duties at the United States Army Hospital in Fort Jackson, South Carolina, told the enlisted personnel in his charge that he would not train Special Forces Aid Men "because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children.'" He also stated, in the presence of patients and those performing duty under his immediate supervision, that he would refuse to go to Vietnam if ordered to do so and they should refuse to do so. Moreover, after being ordered to give dermatological training to Aidmen, he announced to his students that "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey." Unless one is to blind one's eyes in utter worship of the First Amendment, it needs no explication that these disloyal statements and actions undertaken by an officer in the course of duty, are subject to sanction.

SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy.	}	On Appeal from the United States Court of Appeals for the Third Circuit.
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[June 19, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Congress by Art. I, § 8, cl. 14, has power "To make Rules for the Government and Regulation of the land and naval Forces."

Articles 133¹ and 134² of the Code of Military Justice, 10 U. S. C. §§ 933, 934, at issue in this case, trace their legitimacy to that power.

So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for "a presentment or indictment" of a grand jury "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

By practice and by construction the words "all criminal prosecutions" in the Sixth Amendment do not necessarily

¹"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

²"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

cover all military trials. One result is that the guarantee of the Sixth Amendment of trial "by an impartial jury" is not applicable to military trials.³ But Judge Ferguson in *United States v. Tempia*, 16 U. S. C. M. A. 629, 37 C. M. R. 245-249, properly said: ⁴

"... both the Supreme Court and this Court itself are satisfied as to the applicability of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication. The Government, therefore, is correct in conceding the point, and the Judge Advocate General, United States Navy, as *amicus curiae*, is incorrect in his contrary conclusion. Indeed, as to the latter, it would appear from the authorities on which he relies that the military courts applied

³ *O'Callahan v. Parker*, 395 U. S. 258, 262 stated:

"If the case does not arise 'in the land or naval forces,' then the accused gets first, the benefit of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides in part:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.'"

⁴ The Court of Military Appeals has held the "probable cause" aspect of the Fourth Amendment is applicable to military trials, See, e. g., *United States v. Battista*, 14 U. S. C. M. A. 70, 33 C. M. R. 282; *United States v. Gebbart*, 10 U. S. C. M. A. 606, 28 C. M. R. 172; *United States v. Brown*, 10 U. S. C. M. A. 482, 28 C. M. R. 48.

It has been held that the right to counsel under the Sixth Amendment extends to military trials, see *United States v. Culp*, 14 U. S. C. M. A. 199, 216-217, 219, 33 C. M. R. 411, 428-429, 431 (opinions of Quinn, C. J., Ferguson, J.).

There are rulings also that freedom of speech protects, to some extent at least, those in the Armed Services. *United States v. Wysong*, 9 U. S. C. M. A. 249, 26 C. M. R. 29, and see *United States v. Gray*, 20 U. S. C. M. A. 63, 42 C. M. R. 255.

what we now know as the constitutional protection against self-incrimination in trials prior to and contemporaneous with the adoption of the Constitution. Hence, we find Major Andre being extended the privilege at his court-martial in 1780. Wigmore, Evidence, 3d ed, § 2251. The same reference was made in the trial of Commodore James Barron in 1808. Proceedings of the General Court Martial Convened for the Trial of Commodore James Barron (1822), page 98. And, the Articles of War of 1776, as amended May 31, 1786, provided for objection by the judge advocate to any question put to the accused, the answer to which might tend to incriminate him. See Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, pages 196, 972." *Id.*, at 634, 37 C. M. R., at 254.

But the cases we have had so far have concerned only the nature of the tribunal which may try a person and/or the procedure to be followed.³ This is the first case that presents to us a question of what protection, if any, the First Amendment gives people in the Armed Services:

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

On its face there are no exceptions—no preferred classes for whose benefits the First Amendment extends, no exempt classes.

The military by tradition and by necessity demands discipline; and those necessities require obedience in training and in action. A command is speech brigaded with action and permissible commands may not be

³ See e. g., *O'Callahan v. Parker*, 395 U. S. 258; *McElroy v. Guagliardo*, 361 U. S. 281; *Grisham v. Hagan*, 361 U. S. 278; *Kinsella v. Singleton*, 361 U. S. 234; *Reid v. Covert*, 354 U. S. 1; *Toth v. Quarles*, 350 U. S. 11; *Ex parte Quirin*, 317 U. S. 1.

countermanded. There may be a borderland or penumbra that in time can be established by litigated cases.

I cannot imagine, however, that Congress would think it had the power to authorize the military to curtail the reading list of books, plays, poems, periodicals, papers and the like which a person in the Armed Services may read. Nor can I believe Congress would assume authority to authorize the military to suppress conversations at a bar, ban discussions of public affairs, prevent enlisted men or women or draftees from meeting in discussion groups at times and places and for such periods of time that do not interfere with the performance of military duties.

Congress has taken no such step here. By Art. 133 it has allowed punishment for "conduct unbecoming an officer and a gentleman." In our society where diversities are supposed to flourish it never could be "unbecoming" to express one's views, even on the most controversial public issue.

Article 134 realizes only "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces."

Capt. Levy, the respondent in the present case, was not convicted under Art. 133 and 134 for failure to give the required medical instructions. But as he walked through the facilities and did his work, or met with students, he spoke of his views of the "war" in Vietnam. Thus he said:

"The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they

are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of the casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children."

Those ideas affronted some of his superiors. The military, of course, tends to produce homogenized individuals who think as well as march—in unison. In *United States v. Blevens*, 5 U. S. C. M. A. 480, 18 C. M. R. 104, the Court of Military Appeals upheld the court-martial conviction of a serviceman who had "affiliated" himself with a communist organization in Germany. The serviceman argued that there was no allegation that he possessed any intent to overthrow the Government by force, so that the Smith Act, 18 U. S. C. § 2385, would not reach his conduct. The Court of Military Appeals affirmed on the theory that his affiliation, nonetheless, brought "discredit" on the armed forces within the meaning of Art. 134:

"Most important to the case is the Government's contention that regardless of any deficiencies under the Smith Act, the specification properly alleges, and the evidence adequately establishes, conduct to the discredit of the armed forces in violation of Article 134.

"Membership by a school teacher in an organization advocating the violent disestablishment of the United States Government has been regarded as conduct requiring dismissal. *Adler v. Board of Education*, 342 U. S. 485. It seems to us that such membership is even more profoundly evil in the case

of a person in the military establishment. True affiliation implies something less than membership (Bridges v. Wixon, 326 U. S. 135, 143), but the supreme duty of the military is the protection and security of the government and of the people. Hence, aside from a specific intent on the part of the accused to overthrow the government by violence, the conduct alleged is definitely discrediting to the armed forces."

The limitations on expressions of opinion by members of the military continue to date. During the Vietnam war, a second lieutenant in the reserves, off-duty, out of uniform, and off-base near a local university, carried a placard in an antiwar demonstration which said "END JOHNSON'S FACIST [sic] AGGRESSION IN VIETNAM." He was convicted by a court-martial under Art. 88 for using "contemptuous words" against the President and under Art. 133 for "conduct unbecoming an officer." The Court of Military Appeals affirmed, theorizing that suppression of such speech was essential to prevent a military "man on a white horse" from challenging "civilian control of the military." *United States v. Howe*, 17 U. S. C. M. A. 165, 175; 37 C. M. R. 429, 435. The Court did not attempt to weigh the likelihood that Howe, a reserve second lieutenant engaging in a single off-base expression of opinion on the most burning political issue of the day, could ever be such a "man on a white horse." Indeed, such considerations were irrelevant:

"True, petitioner is a reserve officer, rather than a professional officer, but during the time he serves on active duty he is, and must be, controlled by the provisions of military law. In this instance, military restrictions fall upon a reluctant 'summer soldier'; but at another time, and differing circum-

stances, the ancient and wise provisions insuring civilian control of the military will restrict the 'man on a white horse.'" *Ibid.*

See generally Sherman, *The Military Courts And Servicemen's First Amendment Rights*, 22 *Hastings L. J.* 325 (1971.)

The power to draft an army includes of course the power to curtail considerably the "liberty" of the people who make it up. But Congress in these Articles has not undertaken to cross the forbidden First Amendment line. Making a speech or comment on one of the most important and controversial public issues of the past two decades cannot by any stretch of dictionary meaning be included in "disorders and neglects to the prejudice of good order and discipline in the armed forces." Nor can what Capt. Levy said possibly be "conduct of a nature to bring discredit upon the armed forces." He was uttering his own belief—an article of faith that he sincerely held. This was no mere ploy to perform a "subversive" act. Many others who loved their country shared his views. They were not saboteurs. Uttering one's beliefs is sacrosanct under the First Amendment.* Punishing the utterances is an "abridgement" of speech in the constitutional sense.

* The words of Justice Holmes written in dissent in *United States v. Schwimmer*, 279 U. S. 644, 654-655, need to be recalled:

"... the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because

the applicant thought that the Eighteenth Amendment should be repealed.

"Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States*, 249 U. S. 47. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination, which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

That dissent by Holmes became the law when *Schwimmer, United States v. Macintosh*, 283 U. S. 605, and *United States v. Bland*, 283 U. S. 636, were overruled by *Girouard v. United States*, 328 U. S. 61.

SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden,
et al., Appellants,
v.
Howard B. Levy.

} On Appeal from the United
States Court of Appeals for
the Third Circuit.

[June 19, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933 (1970), makes it a criminal offense to engage in "conduct unbecoming an officer and a gentleman."¹ Article 134, 10 U. S. C. § 934 (1970), makes criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces." and "all conduct of a nature to bring discredit upon the armed forces."² The Court today, reversing a unanimous

¹ Article 133 provides:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

² Article 134 provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The clause in Art. 134 prohibiting "all crimes and offenses not capital" applies only to crimes and offenses proscribed by Congress. See Manual for Courts-Martial, United States ¶ 213 (e) (1969) [hereinafter referred to as Manual]. Cf. *Grafton v. United States*, 206 U. S. 333. As such, this clause is simply assimilative, like 18

judgment of the Court of Appeals, upholds the constitutionality of these statutes. I find it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain General Articles, and I would, accordingly, affirm the judgment before us.

I

As many decisions of this Court make clear, vague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391. As the Court put the matter in *Lanzetta v. New Jersey*, 306 U. S. 451, 453, "No one may be required at peril of life, liberty or property to speculate as to the meaning of criminal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U. S. 174, 176.³

Secondly, vague statutes offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement. *Papachristou v. City of Jacksonville*, 405 U. S. 156, 165-

U. S. C. § 13 (1970), and is not the subject of the vagueness attack mounted by appellee on the balance of Art. 134. See generally Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A. B. A. J. 357, 358; Note, *Taps for the Real Catch-22*, 81 Yale L. J. 1518 n. 3.

³ See also *United States v. Harriss*, 347 U. S. 612, 617:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

171. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis . . ." *Grayned v. City of Rockford*, 408 U. S. 104, 108-109.⁴ The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure.⁵

It is plain that Arts. 133 and 134 are vague on their face; indeed, the opinion of the Court does not seriously contend to the contrary.⁶ Men of common intelligence—including judges of both military and civil courts—must necessarily speculate as to what such terms as "conduct unbecoming an officer and a gentleman" and "conduct of a nature to bring discredit upon the armed forces" really

⁴ See also *Smith v. Goguen*, — U. S. —, —:

"Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."

⁵ This Court has repeatedly recognized that the dangers inherent in vague statutes are magnified where laws touch upon First Amendment freedoms. See, e. g., *Smith v. Goguen*, *supra*, at —; *Grayned v. City of Rockford*, *supra*, at 109. In such areas, more precise statutory specificity is required, lest cautious citizens steer clear of protected conduct in order to be certain of not violating the law. See generally Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75-85.

⁶ Even one of the staunchest defenders of the General Articles has recognized that:

"It cannot be denied that there is language in the void-for-vagueness cases broad enough to condemn as unduly indefinite the prohibition in Article 133 against 'conduct unbecoming an officer and a gentleman' and the prohibitions in Article 134 against 'all disorders and neglects to the prejudice of good order and discipline in the armed forces' and against 'all conduct of a nature to bring discredit upon the armed forces.'"

Wiener, *supra*, n. 2, at 363.

mean. In the past, this Court has held unconstitutional statutes penalizing "misconduct,"⁷ conduct that was "annoying,"⁸ "reprehensible,"⁹ or "prejudicial to the best interests" of a city,¹⁰ and it is significant that military courts have resorted to several of these very terms in describing the sort of acts proscribed by Arts. 133 and 134.¹¹

Facially vague statutes may, of course, be saved from unconstitutionality by narrowing judicial construction. But I cannot conclude, as does the Court, *ante*, at 19, that the facial vagueness of the General Articles has been cured by the relevant opinions of either the Court of Military Appeals or any other military tribunals. In attempting to give meaning to the amorphous words of the statutes, the Court of Military Appeals has repeatedly turned to Winthrop's Military Law and Precedents, an 1886 treatise. That work describes "conduct unbecoming an officer and a gentleman" in the following manner:

"To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the of-

⁷ *Giaccio v. Pennsylvania*, 382 U. S. 399.

⁸ *Coates v. Cincinnati*, 402 U. S. 611.

⁹ *Giaccio v. Pennsylvania*, 382 U. S. 399.

¹⁰ *Gelling v. Texas*, 343 U. S. 960. Other federal courts have similarly held unconstitutional statutes containing language such as "reflect[s] discredit," *Flynn v. Giarusso*, 321 F. Supp. 1295 (ED La.); "offensive," *Pritikin v. Thurman*, 311 F. Supp. 1400 (SD Fla.); and "immoral" or "demoralizing," *Oestreich v. Hale*, 321 F. Supp. 445 (ED Wis.).

¹¹ See, e. g., *United States v. Lee*, 4 CMR 185, 191 (ABR), petition for review denied, 4 CMR 173 ("reprehensible conduct"); *United States v. Rio Poon*, 26 CMR 830, 833 (CGBR) ("universally reprehended"). See also Note, Taps for the Real Catch-22, 81 Yale L. J. 1518, 1522.

fender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." ¹²

As to the predecessor statute of Art. 134, Colonel Winthrop read it as applicable to conduct whose prejudice to good order and discipline was "reasonably direct and palpable," as opposed to that conduct which is simply "indirectly or remotely" prejudicial—whatever that may mean.¹³ These passages, and the decisions of the Court of Military Appeals that adopt them *verbatim*, scarcely add any substantive content to the language of the Gen-

¹² W. Winthrop, *Military Law and Precedents* 711-712 (2d ed. 1920). The cited language is quoted in *United States v. Howe*, 17 U. S. C. M. A. 165, 177-178, 37 CMR 429, 441-442, and in *United States v. Giordano*, 15 U. S. C. M. A. 163, 168, 35 CMR 135, 140.

Such authoritative publications as *The Officer's Guide* do little better in defining "conduct unbecoming an officer and a gentleman":

"There are certain moral attributes which belong to the ideal officer and the gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet cannot fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness."

R. Reynolds, *The Officer's Guide* 435-436 (1969 rev.). This language is substantially repeated in Manual ¶ 212.

¹³ W. Winthrop, *Military Law and Precedents* 723 (2d ed. 1920). For cases embodying these definitions, see *United States v. Sadinsky*, 14 U. S. C. M. A. 563, 34 CMR 343; *United States v. Holiday*, 4 U. S. C. M. A. 454, 16 CMR 28. See also Manual ¶ 213 (b), containing identical language.

eral Articles. At best, the limiting constructions referred to by the Court represent a valiant but unavailing effort to read some specificity into hopelessly vague laws. Winthrop's definitions may be slightly different in wording from Arts. 133 and 134, but they are not different in kind, for they suffer from the same vagueness as the statutes to which they refer.

If there be any doubt as to the absence of truly limiting constructions of the General Articles, it is swiftly dispelled by even the most cursory review of convictions under them in the military courts. Article 133 has been recently employed to punish such widely disparate conduct as dishonorable failure to repay debts,¹⁴ selling whiskey at an unconscionable price to an enlisted man,¹⁵ cheating at cards,¹⁶ and having an extramarital affair.¹⁷ Article 134 has been given an even wider sweep, having been applied to sexual acts with a chicken,¹⁸ window peeping in a trailer park,¹⁹ and cheating while calling bingo numbers.²⁰ Convictions such as these leave little doubt that "[a]n infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles." Sherman,

¹⁴ *United States v. Journell*, 18 CMR 752 (AFBR).

¹⁵ *United States v. Kupfer*, 9 CMR 283 (ABR), aff'd, 3 U. S. C. M. A. 478, 13 CMR 34.

¹⁶ *United States v. West*, 16 CMR 587 (AFBR), petition for review denied, 20 CMR 398.

¹⁷ *United States v. Alcantara*, 39 CMR 682 (ABR), aff'd, 18 U. S. C. M. A. 372, 40 CMR 84.

For a listing of other representative convictions under Article 133, see H. Moyer, *Justice and the Military* 1028-1034 (1972). See also Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 AF JAG L. Rev. 124.

¹⁸ *United States v. Sanchez*, 11 U. S. C. M. A. 216, 29 CMR 32.

¹⁹ *United States v. Clark*, 22 CMR 888 (AFBR), petition for review denied, 22 CMR 331.

²⁰ *United States v. Holt*, 7 U. S. C. M. A. 617, 23 CMR 81.

The Civilianization of Military Law, 22 Maine L. Rev. 3, 80.

In short, the General Articles are in practice as well as theory "catch-alls," designed to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander.²¹ Not every prosecution of course, results in a conviction, and the military courts have sometimes overturned convictions when the conduct involved was so marginally related to military discipline as to offend even the loosest interpretations of the General Articles.²² But these circumstances can hardly be thought to validate the otherwise vague statutes. As the Court said in *United States v. Reese*, 92 U. S. 214, 221: "It certainly would be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." At best, the General Articles are just such a net, and

²¹ The drafters of the *Manual for Courts-Martial* have admitted as much, characterizing the discredit clause of Art. 134 as the "catch-all" in military law. Legal and Legislative Basis, Manual for Courts-Martial United States 294 (1951). Admitting that the language of Art. 134 is "vague," the drafters state:

"By judicial interpretation these 'vague words' have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline." *Id.*, at 295.

²² See, e. g., *United States v. Ford*, 31 CMR 353, petition for review denied, 31 CMR 314 (conviction under Art. 133 for showing an allegedly obscene photograph to a friend in a private home reversed); *United States v. Waluski*, 6 U. S. C. M. A. 724, 21 CMR 46 (conviction under Art. 134 of passenger for leaving scene of accident reversed).

suffer from all the vices that our previous decisions condemn.

II

Perhaps in recognition of the essential vagueness of the General Articles, the Court today adopts several rather periphrastic approaches to the problem before us. Whatever the apparent vagueness of these statutes to us civilians, we are told, they are models of clarity to "practical men in the navy and army." *Ante.* at 12, quoting from *Dynes v. Hoover*, 20 How. 65, 82. Moreover, the Court says, the appellee should have been well aware that his conduct fell within the proscriptions of the General Articles, since the Manual for Courts-Martial gives specific content to these facially uncertain statutes. I believe that neither of these propositions can withstand analysis.

A

It is true, of course, that a line of prior decisions of this Court, beginning with *Dynes v. Hoover* in 1858 and concluding with *Carter v. McClaghry*, 183 U. S. 365, in 1902, have upheld against constitutional attack the ancestors of today's General Articles.²³ With all respect for the principle of *stare decisis*, however, I believe that these decisions should be given no authoritative force in view of what is manifestly a vastly "altered historic environment." *Mitchell v. W. T. Grant Co.*, — U. S. —, — (dissenting opinion). See also *id.*, at — (concurring opinion of POWELL, J.).

It might well have been true in 1858 or even 1902 that those in the armed services knew, through a combination of military custom and instinct, what sorts of acts fell within the purview of the General Articles. But

²³ See also *Swaim v. United States*, 165 U. S. 553; *United States v. Fletcher*, 148 U. S. 84; *Smith v. Whitney*, 116 U. S. 167.

times have surely changed. Throughout much of this country's early history, the standing army and navy numbered in the hundreds. The cadre was small, professional, and voluntary. The military was a unique society, isolated from the mainstream of civilian life, and it is at least plausible to suppose that the volunteer in that era understood what conduct was prohibited by the General Articles.²⁴

It is obvious that the Army into which Dr. Levy entered was far different. It was part of a military establishment whose members numbered in the millions, a large percentage of whom were conscripts or draft-induced volunteers, with no prior military experience and little expectation of remaining beyond their initial period of obligation.²⁵ Levy was precisely such an individual, a draft-induced volunteer whose military indoctrination was minimal, at best.²⁶ To presume that he and others like him who served during the Vietnam era were so imbued with the ancient traditions of the military as to comprehend the arcane meaning of the General Articles

²⁴ See generally Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U. C. L. A. L. Rev. 821, 833-837. Cf. Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 187-188; Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 292, 301-302.

²⁵ See Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U. C. L. A. L. Rev. 821, 836. Cf. *Avrech v. Secretary of the Navy*, — U. S. App. D. C. —, 477 F. 2d 1237, 1242 (Clark, J.), prob. juris. noted, 414 U. S. 816.

²⁶ The record indicates that Dr. Levy, unlike many other medical officers entering active duty, did not attend the basic military orientation course at Fort Sam Houston, Texas. Instead, he came to Fort Jackson directly from civilian life. While at Fort Jackson, he received but 16 to 26 hours of military training, only a small portion of which was devoted to military justice.

is to engage in an act of judicial fantasy.²⁷ In my view, we do a grave disservice to citizen-soldiers in subjecting them to the uncertain regime of Arts. 133 and 134 simply because these provisions did not offend the sensibilities of the federal judiciary in a wholly different period of our history. In today's vastly "altered historic environment," the *Dynes* case and its progeny have become constitutional anachronisms, and I would retire them from active service.

B

The Court suggests that the Manual for Courts-Martial provides some notice of what is proscribed by the General Articles, through its appendix containing "Forms for

²⁷ The Court suggests, *ante*, at 16-17, that some of the problems with the General Articles may be ameliorated by the requirement of Art. 137, 10 U. S. C. § 937 (1970), that the provisions of the Code be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter," and that they be "explained again after he has completed six months of active duty." Even assuming *arguendo* that it is possible to "carefully explain" the General Articles, I do not believe that Art. 137 cures the vagueness of the statutes. The record in this case indicates that Dr. Levy received only a very brief amount of instruction on military justice; presumably, only a fraction of that instruction was devoted to the General Articles. See n. 26, *supra*. Moreover, Army regulations indicate that only 20 minutes of instruction at the initial military justice lesson for enlisted men is devoted to Arts. 71 through 134 of the U. C. M. J.; 49 minutes on instruction on Arts. 107 through 134 is provided for at the six-months class. Department of the Army, Army Regulation 350-212, Training Military Justice, 2 June 1972; Army Subject Schedule No. 21-10, Military Justice (Enlisted Personnel Training), 24 June 1969. Obviously, only a portion of this total of 69 minutes can be set aside for instruction pertaining to the General Articles. It would be myopic to pretend that such limited instruction on these amorphous criminal statutes provided military personnel with any genuine expertise on the subject, even assuming that *anybody* could ever acquire such expertise.

Charges and Specifications." ²⁸ These specimen charges, which are comprised of fill-in-the-blank accusations covering various fact situations, do offer some indication of what conduct the drafters of the Manual perceived to fall within the prohibitions of Arts. 133 and 134. There are several reasons, however, why the form specifications cannot provide the sort of definitive interpretation of the General Articles necessary to save these statutes from unconstitutionality.

For one thing, the specifications covering Arts. 133 and 134 are not exclusive; the military courts have repeatedly held conduct not listed in the Manual's appendix as nonetheless violative of the General Articles.²⁹ Nor can it be said that the specifications contain any common thread or unifying theme that gives generic definition to the Articles' vague words; the specimen charges in the Manual list such widely disparate conduct as kicking a public horse in the belly,³⁰ subornation of perjury,³¹ and wrongful cohabitation³² as violative of Art. 134.³³ Moreover, the list of offenses included in the Appen-

²⁸ Manual, App. 6c.

²⁹ See, e. g., *United States v. Sadinsky*, 14 U. S. C. M. A. 563, 34 CMR 343 (jumping from ship to sea); *United States v. Sanchez*, 11 U. S. C. M. A. 216, 29 CMR 32 (sexual acts with a chicken). See also *Avrech v. Secretary of the Navy*, — U. S. App. D. C. —, 477 F. 2d 1237, 1242, prob. juris. noted, 414 U. S. 816; Manual, App. 6a (1); Legal and Legislative Basis, Manual for Courts-Martial United States 296 (1951).

³⁰ Manual, App. 6c, Spec. 126.

³¹ *Id.*, App. 6c, Spec. 170.

³² *Id.*, App. 6c, Spec. 188.

³³ Similarly, the specifications concerning Art. 133 cover such dissimilar offenses as copying an examination paper, being drunk and disorderly, failing to pay a debt, and failure to keep a promise to pay a debt. *Id.*, Spec. 122-125. Nowhere under the Art. 133 specifications is there any mention of the conduct with which Levy was charged.

dix is ever-expanding; the 1951 Manual contained 59 Article 134 offenses,³⁴ while the list had increased to 63 in 1969.³⁵ In view of the nonexclusive and transient character of the specification list, a serviceman wishing to conform his conduct to the requirements of the law would simply find definitive guidance from the Manual impossible.

More significantly, the fact that certain conduct is listed in the Manual is no guarantee that it is in violation of the General Articles. The Court of Military Appeals has repeatedly emphasized that the sample specifications are only procedural guides and timesavers for military prosecutors beset by poor research facilities, and are not intended to *create* offenses under the General Articles.³⁶ Consequently, the Court has on several occasions disapproved Art. 134 convictions, despite the fact that the precise conduct at issue was listed in the form specifications as falling under that Article.³⁷

³⁴ Manual, App. 6c, Spec. 118-176 (1951 ed.).

³⁵ Manual, App. 6c, Spec. 126-188 (1969).

³⁶ See *United States v. Smith*, 13 U. S. C. M. A. 105, 32 CMR 105; *United States v. McCormick*, 12 U. S. C. M. A. 26, 30 CMR 26. In these and other cases, the Court of Military Appeals has indicated its belief that Congress did not and could not empower the President to promulgate substantive rules of law for the military. See also *United States v. Barnes*, 14 U. S. C. M. A. 567, 34 CMR 347; *United States v. Margelony*, 14 U. S. C. M. A. 55, 33 CMR 267. Cf. *United States v. Acostas-Vargas*, 13 U. S. C. M. A. 388, 32 CMR 388. The question as to whether the executive has such an inherent power was apparently left open by this Court in *Reid v. Covert*, 354 U. S. 1, 38, and it is not necessary to resolve it in this case. It is enough to note that the Court of Military Appeals has clearly held that inclusion of specific conduct in the Manual does not necessarily mean that it is violative of the General Articles. Given that position of the highest military court, I can hardly conclude that a serviceman could ever receive authoritative notice from the form specifications as to the scope of the Articles.

³⁷ See, e. g., *United States v. McCormick*, 12 U. S. C. M. A. 26, 30 CMR 26; *United States v. Waluski*, 6 U. S. C. M. A. 724, 21 CMR 46.

Despite all this, the Court indicates that Levy should have been aware that his conduct was violative of Art. 134, since one of the specimen charges relates to the making of statements "disloyal to the United States."³⁸ That specification, and the brief reference to such conduct in the text of the Manual,³⁹ is itself so vague and overbroad as to have been declared unconstitutional by one federal court. *Stolte v. Laird*, 353 F. Supp. 1392 (D. C.). But even if a consensus as to the meaning of the word "disloyal" were readily attainable, I am less than confident that Dr. Levy's attacks upon our Vietnam policies could be accurately characterized by such an adjective. However foreign to the military atmosphere of Fort Jackson, the words spoken by him represented a viewpoint shared by many American citizens. Whatever the accuracy of these views, I would be loathe to impute "disloyalty" to those who honestly held them. In short, I think it is clear that the form specification concerning disloyal statements cannot be said to have given Levy notice of the illegality of his conduct. The specimen charge is no better than the Article that spawned it. It merely substitutes one set of subjective and amorphous phraseology for another.⁴⁰

³⁸ Manual, App. 6c, Spec. 139.

³⁹ *Id.*, ¶ 213f (5).

⁴⁰ The Court also holds that even if the General Articles might be considered vague as to some offenders, the appellee has no standing to raise such a claim, since he should have known that his conduct was forbidden. *Ante*, at 20-23. To the extent that this conclusion rests on the Court's holdings that the General Articles are given content through limiting judicial constructions, military custom, or the *Manual for Courts-Martial*, I have indicated above my disagreement with its underlying premises. And to the extent that this conclusion rests on the language of the General Articles, I think that it is simply mistaken. The words of Arts. 133 and 134 are vague beyond repair; I am no more able to discern objective standards of conduct from phrases such as "conduct unbecoming an officer and a

III

What has been said above indicates my view that the General Articles are unconstitutionally vague under the standards normally and repeatedly applied by this Court. The remaining question is whether, as the Court concludes, *ante*, at 22, the peculiar situation of the military requires application of a standard of judicial review more relaxed than that embodied in our prior decisions.

It is of course common ground that the military is a "specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94. A number of serviceman's individual rights must necessarily be subordinated to the overriding military mission, and I have no doubt that the military may constitutionally prohibit conduct that is quite permissible in civilian life, such as questioning the command of a superior. But this only begins the inquiry. The question before us is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them. More specifically, the issue is whether the vagueness of the General Articles is required to serve a genuine military objective.

gentleman" and "conduct of a nature to bring discredit upon the armed forces" that I am from such words as "bad" or "reprehensible." Given this essential uncertainty, I cannot conclude that the statutory language clearly warned the appellee that his speech was illegal. It may have been, of course, that Dr. Levy had a subjective feeling that his conduct violated *some* military law. But that is not enough, for as we pointed out in *Bowie v. City of Columbia*, 378 U.S. 347, 355-356, n. 5, "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants."

The Solicitor General suggests that a certain amount of vagueness in the General Articles is necessary in order to maintain high standards of conduct in the military, since it is impossible to predict in advance every offense that might serve to affect morale or discredit the service. It seems to me that this argument was concisely and eloquently rebutted by Judge Aldisert in the Court of Appeals, 478 F. 2d 772, 795 (CA3):

"[W]hat high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one's duty, and secondly, executing it? And, in this regard, would not even a higher standard be served by delineation of the various offenses under Article 134, followed by obedience to these standards?"

It may be that military necessity justifies the promulgation of substantive rules of law that are wholly foreign to civilian life, but I fail to perceive how any legitimate military goal is served by enshrouding these rules in language so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them.⁴¹ Indeed, I should suppose that vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and *esprit de corps*.

In short, I think no case has been made for finding that there is any legitimate military necessity for perpetuation of the vague and amorphous General Articles. In this

⁴¹ Cf. J. Heller, *Catch-22*, 395 (Dell ed. 1973):

"[W]e accuse you also of the commission of crimes and infractions we don't even know about yet. Guilty or innocent?"

"I don't know, sir. How can I say if you don't tell me what they are?"

"How can we tell you if we don't know?"

regard, I am not alone. No less an authority than Kenneth J. Hodson, former Judge Advocate General of the Army and Chief Judge of the Army Court of Military Review, has recommended the abolition of Art. 134 because "[w]e don't really need it, and we can't defend our use of it in this modern world." Hodson, *The Manual for Courts-Martial—1984*, 57 Military L. Rev. 1, 12.⁴² No different conclusion can be reached as to Art. 133. Both are anachronisms, whose legitimate military usefulness, if any, has long since disappeared.

It is perhaps appropriate to add a final word. I do not for one moment denigrate the importance of our inherited tradition that the commissioned officers of our military forces are expected to be men of honor, nor do I doubt the necessity that servicemen generally must be orderly and dutiful. An efficient and effective military organization depends in large part upon the character and quality of its personnel, particularly its leadership. The internal loyalty and mutual reliance indispensable to the ultimate effectiveness of any military organization can exist only among people who can be counted on to do their duty. It is, therefore, not only legitimate but essential that in matters of promotion, retention, duty assignment and internal discipline, evaluations must repeatedly be made of a serviceman's basic character as reflected in his deportment, whether he be an enlisted man or a commissioned officer. But we deal here with criminal statutes. And I cannot believe that such meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law.

⁴² General Hodson suggests that in place of Art. 134, the Department of Defense and various military commanders could promulgate specific sets of orders, outlawing particular conduct. Those disobeying these orders could be prosecuted under Art. 92 of the U. C. M. J., 10 U. S. C. § 892 (1970), which outlaws the failure to obey any lawful order. See also Note, *Taps for the Real Catch-22*, 81 Yale L. J. 1518, 1537-1541, containing a similar suggestion.

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